LEGAL ASPECTS of the HAWAIIAN HOMES PROGRAM

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FOREWORD

The Legislative Reference Bureau's study of the Hawaiian Homes Program, prepared pursuant to House Resolution 87, Budget Session of 1962 (which appears as Appendix A of Report No. 1, 1964) consists of the following reports:

(1) The Hawaiian Homes Program: 1920-1963 (LRB Report No. 1, 1964);
(2) Legal Aspects of the Hawaiian Homes Program (LRB Report No. 1a, 1964);
(3) Land Aspects of the Hawaiian Homes Program (LRB Report No. 1b, 1964);
(4) Social Aspects of the Hawaiian Homes Program (LRB Report No. 1c, 1964);
(5) The Maori Affairs Program (LRB Report No. 1d, 1964); and
(6) Organization and Administration of the Hawaiian Homes Program (a working paper dated January, 1963).

The reports may be used individually by those interested in particular phases of the Hawaiian Homes Program or collectively by those interested in studying the program in its totality.

This report on the legal aspects of the Hawaiian Homes Program: (1) analyzes the contents of the Hawaiian Homes Commission Act of 1920 as it exists in 1963; (2) presents and explains the arguments that have been advanced for and against the constitutionality of the Act; (3) examines the implications of the Admission Act; and (4) analyzes the means of amending the Act. The provisions of the Act are organized and analyzed on a subject matter, rather than section-by-section basis since it was felt that this arrangement would be of greater benefit to the reader. In discussing each subject, all available, relevant legal matterials have been brought together, including opinions of the Attorney General, court cases and statutory material. To assist the reader in locating opinions and cases, an index of opinions and cases appears as an appendix.

In discussing the constitutionality of the Hawaiian Homes Commission Act of 1920, no attempt is made to either prove or disapprove the validity of the Act. Arguments advanced during congressional hearings and constitutional convention meetings are included so that the reader may become familiar with all arguments since no decisive court decision has been rendered to date.

The validity and implications of the Admission Act are examined. The memoranda prepared by the Attorney General's Office during 1959 were found to be particularly helpful.

Citations appear in the text itself so as to lead the reader to the original source with ease; for as is often the case, summarized or paraphrased legal materials are not immune from subjective selection and interpretation.

The appreciation of the Bureau is extended to the Attorney General of the State of Hawaii, Mr. Bert T. Kobayashi, and to the Chairman of the Hawaiian Homes Commission, Mr. Abraham K. Piianaia; their understanding and assistance have greatly facilitated the preparation of this report.

Tom Dinell
Director

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INTRODUCTION

The Hawaiian Homes Commission Act (Act of July 9, 1921, 42 Stat. 108, c. 42) was enacted by the Congress of the United States for the purpose of rehabilitating the Hawaiian race through a return to the soil. The Hawaiian Homes Commission was established by the Act to administer its provisions. The Act allows persons who have at least one-half Hawaiian blood to become lessees of the Hawaiian Homes Commission and to:

(1) lease lands which were set aside for the use of the Hawaiian Homes Commission and its lessees for 99 years at a rental of $1 per year;
(2) obtain loans for agricultural and grazing operations and for constructing and repairing their homes;
(3) use community pastures which were to be set aside;
(4) obtain real property tax exemption for a period of years; and
(5) obtain immunity for their interest in such lands from attachment, levy or sale upon court process.

The Hawaiian Homes Commission was established by the Congress of the United States as a territorial agency but with relative independence from territorial legislative, budgetary and civil service controls. The Act provides the Commission with independent sources of income--30 per cent of the territorial revenues derived from the leasing of cultivated sugar cane lands or from water licenses and all income from the leasing of "available lands" of the Commission. The Act guarantees the Commission a minimum operating budget of not less than $200,000 per biennium; however, such amount may be increased by the legislature. Only one of the Commission's four funds is subject to legislative and budgetary scrutiny. The Act was amended in 1944 (58 Stat. 216) so that the personnel of the Commission were not governed by the laws governing the selection of the territorial civil service personnel and thus persons could be hired without competitive examinations. However, their pay and classifications were to be set by territorial practice.

The Act also gave the Commission broad authority to undertake water and land development projects which would be beneficial to the lessees. In the social and economic spheres, the Commission was authorized to undertake activities that would prove to be of aid to the lessees.

The Act has subsequently been amended on many occasions by Congress usually at the insistence of the territorial legislature

or the Commission. The purpose of the Act throughout the years has remained in essence the same; however, specific provisions which restricted the Commission both in terms of money and authority have been broadened. Perhaps the most outstanding amendments to the Act occurred when Hawaii attained statehood and during the period following statehood.

The Constitution of the State of Hawaii, which was drafted in 1950, some nine years prior to statehood, made provision for the inclusion of the Hawaiian Homes Commission Act as a law of the State and further provided that the conditions or limitations placed by Congress on the State regarding the amending process of the Act would be adhered to by the State and its people. The Admission Act (Act of March 18, 1959; 73 Stat. 4) in section 4 required the State by way of compact to adopt the Hawaiian Homes Commission Act as a provision of the State Constitution and provided that amendments to the Act could be effected only in a manner prescribed by Congress.

Amendments to the Act by the Hawaii State Legislature following statehood have:

(1) abolished the Hawaiian Homes Commission as an agency and created the Department of Hawaiian Home Lands to be headed by an executive board to be known as the Hawaiian Homes Commission (L. Sp. 1959, 2d, c. 1);
(2) broadened the purposes for which loans may be made and increased the amounts of loans that can be made (L. 1962, c. 14 and c. 18); and
(3) provided for a full-time chairman appointed by the Governor and placed all employees under the civil service system with a proviso that gives first preference in job recruitment to qualified persons of Hawaiian extraction (L. 1963, c. 207).

Chapter I

ANALYSIS OF THE HAWAIIAN HOMES COMMISSION ACT

The Department of Hawaiian Home Lands is an unusual state department. Originally created by Congress as the Hawaiian Homes Commission in the Hawaiian Homes Commission Act of 1920 (42 Stat. 108), it was incorporated into the Constitution of the State of Hawaii in accordance with the requirements of the Admission Act (73 Stat. 4; am. 74 Stat. 422 and 423).

PURPOSE OF THE ACT

The purpose of the Act is not specified in the Act itself. However, the Attorney General has placed great reliance on the committee hearings when interpreting the Act. He has commented on its purpose in several of his opinions; and on one occasion he stated that the purpose was:

> . . . to save the native Hawaiian race from extinction by reason of its inability to meet successfully the economic and sociologic changes brought about in the islands by reason of the influx of white and asiatic races. . . . Hawaiians would be removed from the slums, be given land to work, and be taught to successfully live in the new cosmopolitan society. The generosity of the Hawaiian was recognized, and so the Act prohibited free alienation of such land as he might be given under the Act. The impoverished state of the Hawaiian was recognized and so the Act provided for a nominal rent of a dollar a year for the lease of such land and set up a revolving loan fund bearing a low rate of interest to aid him in building a home and in making a start. The lack of the Hawaiian "know-how" was recognized and so the Act provided for the hiring of agricultural experts and sanitation and reclamation experts to teach him the latest advances in modern science (Letter Opinion of November 13, 1951; FWH:md; 14:25).

The Attorney General amplified his view of the purpose of the Act when he spoke of the Hawaiian who might be reckless or lazy by quoting from the statements of Reverend Akaiko Akana who testified at the congressional hearings:

> . . . Through this bill those who are inclined to be reckless cannot sell their holding; and should they be inclined to be too lazy to be of any value to the idea of rehabilitation, the Commission has the right to remove them, and, in their stead, worthy Hawaiians could be given a chance to secure lands on which to live and to work, instead of being barred out because the worthless ones had already come before them (Letter Opinion of August 14, 1952; FWH:md; 137:25).

Clearly the emphasis in the Act, as seen by the Attorney General, was to permit the Hawaiian, a victim of change, to return to the land. Paternal assistance was provided by a commission created by congressional statute. This statute protected the Hawaiian against himself and at the same time attempted to promote his well-being.

APPLICABILITY OF STATUTES

The legal status of the Hawaiian Home Lands Department and its program is similar to that of other departments of state government with respect to state and territorial statutes of general applicability. The Attorney General has commented on this by stating:

> The Commission--like every other agency of the Territorial government--is subject to statutes concerning the regulation of expenditures of public money (Opinion No. 1120 of March 5, 1924).
>
> The Administrative Procedures Act applies to all departments of the State government and the Department of Hawaiian Home Lands is one of such departments. . . . State legislation would apply to Hawaiian Home Lands only so long as such legislation is not within the types of provision requiring the consent of the United States (Opinion No. 63-16 of March 20, 1963; see also s. 222, HHCA, 1920).

ORGANIZATION AND AUTHORITY

Shortly after the admission of Hawaii as a state, the agency known as the Hawaiian Homes Commission was transferred into the Department of Hawaiian Home Lands, one of the eighteen (now seventeen) departments of the State (L. Sp. 1959, 2d, c. 1, s. 24; am. L. 1963, c. 207, s. 6; R.L.H. 1955, sec. 14A-23, as amended). This Department is vested with the responsibility of administering the Hawaiian Homes Commission Act of 1920, as amended (s. 202, HHCA, 1920). The name Hawaiian Homes Commission is still retained as the name of the executive board which heads the Department. (The Hawaiian Homes Commission Act of 1920, as amended, will hereafter be cited as HHCA, 1920.)

LEGAL ASPECTS

THE COMMISSION: ITS RESPONSIBILITIES AND MEMBERSHIP

Executive responsibility is lodged in a commission which is specificially: (1) authorized to formulate and adopt rules, regulations and policies; (2) required to pay all expenses upon the presentation of itemized vouchers approved by the chairman of the Commission; and (3) required to submit an annual report to the Legislature upon the first day of each regular session and such special reports as are requested (s. 222, HHCA, 1920).

The executive board of the Department is composed of seven members who are nominated and appointed by the Governor, by and with the advice and consent of the Senate, for overlapping four-year terms. Of the 7 members of the Commission, 4 must be residents of the City and County of Honolulu and 3 (1 each) from the counties of Hawaii, Maui and Kauai. All members must have been residents of the State of Hawaii for at least 3 years preceding their appointment and at least 4 of the members must be persons of not less than one-fourth Hawaiian blood (s. 202, HHCA, 1920).

The members of the Commission, except for the chairman, serve without pay but provision is made for payment of their actual expenses incurred while discharging their duties. The Act, which was amended during the 1963 session (L. 1963, c. 207), provided: (1) that the chairman be appointed by the Governor; (2) that his compensation shall not exceed $18,500 per year; and (3) that the chairman devote his full time to the performance of those duties delegated to him by the Commission (s. 202, HHCA, 1920). The chairman must be bonded in the sum of $25,000 with the sureties and the condition of the bond approved by the Governor (s. 222, HHCA, 1920).

THE LEGALITY OF A SINGLE EXECUTIVE

During the 1963 session a bill (H.B. 1352) which would have established a single executive for the Department of Hawaiian Home Lands passed both houses of the legislature. On the last day of the session, the Attorney General by letter opinion (Letter Opinion of May 3, 1963; BTK:ft; 22a:8a), in response to a request for his opinion, reaffirmed a view he previously expressed in a 1961 opinion by stating:

> An amendment to the Hawaiian Homes Commission Act to provide for the elimination of the Hawaiian Homes Commission and to substitute therefor a single executive to manage Hawaiian Home Lands under the Act would violate section 2 of Article X of the Constitution of the State of Hawaii (Opinion No. 61-50 of April 25, 1961).

Section 2 of Article X of the Constitution of the State of Hawaii reads as follows:

> SECTION 2. The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be authorized by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission.

The first clause, taken alone, mandates the establishment of a board. However, the closing clause excepts those situations in which the land is set aside for public use (other than for conservation reserves) from the requirement of an executive board. This closing clause makes it possible to place state office buildings under the jurisdiction of the Department of Accounting and General Services and harbor facilities under the Department of Transportation. The question remains as to whether or not this closing clause excepts the Department of Hawaiian Home Lands as well as other agencies from the requirements of an executive board. A close examination of both the letter opinion and the opinion cited above does not disclose whether or not the Attorney General considered the closing clause before rendering his opinion. If such closing clause were considered, then the reasoning why such closing clause did not apply to Hawaiian home lands was not made apparent.

RULE MAKING AUTHORITY

The responsibility of the Commission to adopt rules and regulations in accordance with the provisions of the Act is specifically provided for in section 222, HHCA, 1920. This comprehensive power has been consistently upheld by the Attorney General:

> The Hawaiian Homes Commission has ample authority under the Act, to provide regulations governing the occupancy of the land and its use, so long as the regulations do not conflict with the

> provisions of the act. . . . A lessee has no authority to use his land in contravention of any reasonable regulations adopted by the Commission. If a regulation should be adopted, providing that a lessee shall not hire labor to perform his work, such a regulation would be valid. The spirit of the act makes it necessary that the lessee himself cultivate the tract. The main purpose of the Hawaiian Homes Commission Act was to bring about the re-establishment of the Hawaiians on the land. . . . (Opinion No. 1168 of September 23, 1924).

APPLICABILITY OF CIVIL SERVICE

Since the passage of Act 207, Session Laws of Hawaii 1963, all employees, except for the first deputy and the private secretary of the chairman of the Commission have been placed under civil service appointment and tenure. However, the Act gives preference in the hiring of employees to qualified persons of Hawaiian extraction (s. 202, HHCA, 1920).

LAND OWNERSHIP AND SELECTION

The most important single financial asset of the Hawaiian homes program is the lands assigned to the Department of Hawaiian Home Lands. From what were known as the public lands of the Territory in the 1920's were designated, by law and by administrative selection, certain lands which were to become known as Hawaiian home lands.[1]

LAND TITLE

Title to the public lands of the Territory, including "available lands" as defined in section 203 of the HHCA, 1920, subsequent to Annexation in 1898, was vested in the United States by the Newlands Resolution, until the Admission Act was passed in 1959 (S.J.R. No. 55, To Provide for Annexing the Hawaiian Islands to the United States of July 7, 1898, 230 Stat. 750, 2 Supp. R.S. 895 and Act of March 18, 1959, 73 Stat. 4, Public Law 86-3, s. 5).

The Attorney General confirmed these transfers of title in 1961 when he stated:

> Congress, by the enactment of the Hawaiian Homes Commission Act in 1920 originally set aside 200,000 acres of land in Hawaii for the rehabilitation and resettlement of native Hawaiians under the management of the Hawaiian Homes Commission. Title to these

Hawaiian home lands remained in the United States prior to statehood, but vested in the State of Hawaii upon admission of Hawaii into the Union (Opinion No. 61-50 of April 25, 1961).

AVAILABLE LANDS AND HAWAIIAN HOME LANDS

The term "available lands" is used in the Hawaiian Homes Commission Act to denote all those public lands described in section 203 from which Hawaiian home lands were to come; some by specific designation in the Act and some by selection of the Commission, within specified time limits, from lands in specified areas. Specifically excluded from "available lands" were: (1) public lands within any forest reservation; (2) cultivated sugar cane lands; and (3) public lands held under a certificate of occupation, homestead lease, right of purchase lease or special homestead agreement (s. 203, HHCA, 1920). Sugar plantation camp areas are not considered "available lands" since the Attorney General defined the words "cultivated sugar cane lands" as including plantation camp sites (Memorandum Opinion of April 3, 1956; ENS:PH; 462:37:25:OLC).

"Hawaiian home lands" include all of the lands described as available except available lands: (1) that were not selected by the Commission as authorized by section 203; (2) that are returned to the Department of Land and Natural Resources for leasing; and (3) that were under lease at the time of the passage of the Act until such time as the lease expires or the Commission withdraws the lands from the operation of the lease (s. 204, HHCA, 1920).

SELECTION OF LANDS

The Commission was to select certain of its lands from larger areas of available lands within specified time limits. Once the selection was completed or the option period lapsed, then the remaining areas were no longer "available lands" but were public lands. Prior to 1928, section 204(3), the provision which governed selection of lands, read as follows:

> In case any land is to be selected by the commission out of a larger area of available lands, such land shall not assume the status of Hawaiian home lands until the commission, with the approval of the Secretary of the Interior, makes the selection and gives notice thereof to the commissioner of public lands. The commissioner shall give such notice within three years after the

> expiration of the five-year period referred to in paragraph 1 of this section. Any such notice given thereafter . . . shall be deemed invalid and of no effect.

Although section 204(3) was eliminated by the Act of March 27, 1928 (45 Stat. 246, c. 142), the Attorney General ruled that section 204(3) still had validity and the eight-year limitation for the selection of lands still applied by stating:

> By amendment of Section 204 by the Act of March 7, 1928, as above stated, this paragraph 3 of Section 204 was eliminated, but Section 205 which had incorporated the same within itself by reference, was not amended. Since we are required, if possible, to give effect to every provision of the statute, and since paragraph 3 of the present amended Section 204 does not make sense when read in connection with Section 205, we are forced to conclude that for the purposes of Section 205, the original paragraph 3 of Section 204 is still in effect. . . .
>
> . . . This means that, unless the Hawaiian Homes Commission within three years after the expiration of five years from the date of its first meeting . . . selects out of the larger areas mentioned in Section 203, the smaller areas which it is authorized to select therefrom, . . . and gives notice thereof to the Commissioner of Public Lands, any selection . . . thereafter . . . will be invalid and the lands so selected, . . . will lose the status of available lands and be taken out of the control of the Commission. It behooves the Commission, therefore, . . . to make such selection within eight years from the date of the first meeting of the Commission, if it is desired to secure these selectable areas for the uses of the Commission. . . . (Opinion No. 1515 of November 27, 1928).

The first meeting of the Hawaiian Homes Commission occurred on September 20, 1921.

THE 20,000 ACRE LIMITATION

The Department may not lease, use or dispose of more than 20,000 acres of Hawaiian home lands, for settlement of native Hawaiians, in any calendar five-year period (s. 204(3), HHCA, 1920). The purpose of the limitation was explained by the Attorney General as being: (1) to prevent the dislocation to the civilian economy by the sudden withdrawal of vast tracts of available lands for the use and settlement of native Hawaiians; and (2) to afford the Hawaiian Homes Commission a period of progressive orderly planning and the build-up of funds to assure the success of an expanding program (Letter Opinion of March 13, 1953; FWH:md; 1213:20:25). In that opinion he therefore ruled that the Commission

could substitute lands already withdrawn for an equal area of lands not withdrawn since it did not seriously affect the civilian economy. However, in a case where the Attorney General felt that such substitution would have an adverse effect upon the civilian economy, he ruled that it could not be effected (Letter Opinion of October 23, 1953; ENS:md; 73:25:37).

The Attorney General has also noted that the 20,000 acre limitation is merely a limit upon the area of lands which can be disposed of by the Commission during any five-year period and that it does not require the Commission: (1) to select 20,000 acres every five years; or (2) to dispose of the entire 20,000 acres during such five-year period; or (3) to dispose of any part of that acreage during any one year (Opinion No. 1515 of November 27, 1928).

GENERAL RESTRICTIONS

General restrictions have been placed by Congress on the ability of the Department and other public officials to control and dispose of Hawaiian home lands.

The Department may not sell, lease, use or dispose of available lands except in the manner and for the purposes set out in the Act or as may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of the Act. These restrictions do not govern the disposal of unselected portions of lands from which the Department has made a selection or lands which the Department has failed to so select as provided for in section 204(3) (s. 206, HHCA, 1920).

The power and duties of the Governor and the Department of Land and Natural Resources do not extend to land having the status of Hawaiian home lands except as provided in the Act (ss. 205 and 206, HHCA, 1920).

OTHER STATE STATUTES

The Hawaiian Homes Commission, with the approval of the Governor, may, for the purpose of aiding and cooperating in the planning, construction and operation of federal low-income housing projects, grant, sell, convey or lease for any period, any parts of public lands, with or without consideration, to the Hawaii Housing Authority or to the United States or any agency thereof (R.L.H. 1955, sec. 76-1).

USES AND DISPOSITION OF LANDS

The HHCA, 1920, is quite specific in establishing the limitations on the uses to which Hawaiian home lands may be put by the Department and by the homesteader. It is also specific in setting forth the conditions governing the disposition of these lands. Opinions of the Attorney General over the years have tended both to clarify and reiterate these limitations and conditions.

LEASING OF LANDS

The Department is authorized to lease Hawaiian home lands to native Hawaiians (any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778) (s. 201, HHCA, 1920). While the homesteader is designated as a lessee by the Act, the Attorney General has noted that he does not acquire the usual and ordinary rights of a lessee in the land:

> . . . the lessee takes the land subject to the lease being cancelled or surrendered in accordance with the provisions of the Act. He may put improvements upon the land, but he may not convey these improvements to anyone other than qualified Hawaiians, and then only with the consent and approval of the Hawaiian Homes Commission. Whenever the lease is cancelled or surrendered the improvements on the land are appraised in accordance with the procedure set forth in the Act, and the Hawaiian Homes Commission is empowered to "purchase" said improvements from the homesteaders and in turn lease the same with the land to any subsequent lessees. . . . (Opinion No. 551 of May 5, 1942).

The Department is to receive applications for leases, formulate regulations for the application and granting of leases, and enter into such leases with the applicants whom it feels are qualified to perform the conditions of the lease (s. 207(b), HHCA, 1920). The original lessee must be at least twenty-one years old and if married only one of the spouses is entitled to a lease (s. 208(1), HHCA, 1920).

The Department, however, according to the Attorney General:

> . . . is without authority to impose as a condition to becoming or remaining a lessee of Hawaiian home lands that a person who is otherwise qualified must join and remain in a Hawaiian Homes Commission sponsored cooperative. The qualifications for becoming a homesteader are set forth in full in the Hawaiian Homes Commission Act, 1920, as amended, and cannot be modified or supplemented without the express authorization of Congress. The rule-making

> power provided in section 207(b) is limited to administrative details only and is not to be construed as enabling the Commission to fix qualifications of persons eligible to share in the benefits provided by the Act. Congress has determined the extent of the class to be benefited; only Congress can now change the extent of that class (Letter Opinion of January 7, 1952; FWH:AH:md; 372:25).

Only the Department, however, may permit a transfer of a leasehold:

> Under section 208(5) of the Hawaiian Homes Commission Act, 1920, a transfer of a leasehold to a qualified Hawaiian may only be made with the approval of the Commission. In other words the Commission has full authority to deny such a request. The lessee has no statutory right to transfer.
>
> . . . The act invests the Commission with the absolute discretion in these matters. . . . (Letter Opinion of January 22, 1954; HTY:md; 587:25).

Acreage and Use Limits. The HHCA, 1920 establishes specific acreage limits for each lessee. These limits are as follows:

Type of Land	Limits (in acres)[a] Minimum	Maximum
Agricultural	1	40
Pastoral, first-class	100	500
Pastoral, second-class	250	1,000
Pastoral, irrigated	40	100
Residence	-	1
Residence, Kalanianaole Settlement, Molokai (existing lease)	-	4

Source: (s. 207(a), HHCA, 1920).

[a] A lease may grant to a lessee two detached farm lots located on the same island, within a reasonable distance from each other, one of which shall be designated as a house lot, but the acreage of both lots shall not exceed the maximum acreage of an agricultural or pastoral lot (s. 207(a), HHCA, 1920). In such instances a single lease is to be issued (Letter Opinion of July 14, 1955; AO:PH; 649:25).

The Attorney General emphasized the finality of the acreage limits when he held:

> . . . that the commission is without power to lease 10 additional acres to a lessee having forty acres of agricultural land for a period of one year as an experimental farm since section 207(a) (1) of the Hawaiian Homes Commission Act of 1920, as amended, authorizes the Commission to lease an acreage limit of not less than one nor more than forty acres of agricultural lands. (Letter Opinion of September 6, 1956; PKM:lnc; 1064:25:OLC).

In another opinion he emphasized the limitations inherent in the definitions of different classes of land referred to in the HHCA, 1920, when he held that fish ponds cannot be leased as a detached agricultural land area by the Commission since section 201(b) adopts the definitions contained in section 351, R.L.H. 1915 and "agricultural lands" are therein defined as lands suitable for the cultivation of crops and including wet lands such as taro and rice lands (Letter Opinion of September 14, 1956; PKM:lnc; 1087:25:OLC). Further, the Attorney General, in commenting on a use not specified in the HHCA, 1920 held that neither the lessee nor the Department had the power to authorize the construction of multi-unit apartment projects on Hawaiian home lands (Opinion No. 62-9 of February 21, 1962).

Duties of Lessees. The HHCA, 1920, specifies the duties which a qualified applicant assumes when he becomes a lessee as:

(1) to pay a rental of one dollar a year for a ninety-nine year lease (s. 208(2), HHCA, 1920);

(2) to occupy and commence to use or cultivate the tract within one year after the date of the lease (s. 208(3), HHCA, 1920);

(3) to plant and maintain 5, 10, 15, and then 20 trees per acre during the first 4 years of the lease if he has leased agricultural lands; to plant and maintain 2, 3, 4, and then 5 trees per acre if he has leased pastoral lands; the trees are to be furnished to the lessee free of charge by the Commission and they are to be planted in locations designated by the Commission (s. 208(3), HHCA, 1920);

(4) not to transfer to, or mortgage, pledge, or otherwise hold, or agree to do so, for the benefit of any other person or group of persons or organizations except a

native Hawaiian or Hawaiians, and then only upon the approval of the Department (s. 208(5), HHCA, 1920);

(5) not to sublet his interest in the tract or the improvements thereon (s. 208(5), HHCA, 1920);

(6) to pay all taxes assessed upon the tract and improvements thereon (s. 208(6), HHCA, 1920); and

(7) to perform such other conditions as may be specified by the Department in the lease (s. 208(7), HHCA, 1920).

Though it is a duty of the lessee to pay all property taxes, the Department may pay such taxes for the lessee and obtain a first priority lien as provided in section 216 (s. 208(6), HHCA, 1920).

SUBLEASING, AGISTMENT AND PINEAPPLE CONTRACTS

The HHCA, 1920, is specific in prohibiting subleasing. Recently, the Attorney General re-emphasized this prohibition by ruling that the Department does not have the authority to approve a lessee's plan to subdivide her tract and to sublease a portion of such tract to her daughter. He has also ruled that the lessee of Hawaiian home lands is prohibited by statute from subleasing his interest in the tract or the improvements thereon (Opinion No. 61-65 of June 9, 1961).

Certain arrangements, however, have been authorized as not being subleases. Among these are agistments and pineapple contracts. The Attorney General has defined an agistment as an arrangement by a lessee for:

> . . . the pasturing of cattle or similar animals as a bailee in consideration of an agreed price to be paid by the owner (Letter Opinion of January 7, 1954; HTY:md; 466:25).

These arrangements have been approved where the contract does not: (1) prevent, or in any way interfere with, the continued exclusive occupancy of the entire homestead by the homesteader; (2) preclude self-employment by the homesteader on his homestead; (3) contain terms and conditions so oppressing in nature as to mitigate against the rehabilitation of the homesteader; and (4) occasion a transfer or other disposition, directly or indirectly, of an interest in the homestead (Letter Opinion of December 18, 1952; FWH:md; 714:25). For examples where arrangements have been called agistments but have been held to be subleases, see Letter Opinion of August 28,

1953; ENS:md; 953:25 and Letter Opinion of January 7, 1954; HTY:md; 466:25.

Pineapple contracts are common to the Island of Molokai. It is an agreement whereby the homesteader contracts to allow a pineapple company to use his land to grow pineapples and in return he receives fixed payments per lot plus a share in the profits from the pineapple company. These contracts have been the subject of a series of decisions by the Attorney General and have been the subject of review by one of the state circuit courts.

The first opinion (Opinion No. 1168 of September 23, 1924) held that a pineapple contract was valid as long as a lessee did not in any manner transfer, mortgage, pledge, or otherwise hold his interest in Hawaiian home lands for the benefit of such a company, nor for any other person, excepting a native Hawaiian. The second opinion appeared in 1926 which stated:

> Under the Hawaiian Homes Commission Act of 1920, a cropping contract which merely provides that, upon neglect by the lessee properly to cultivate the crop on which advances have been made, the party making said advances may take possession of said growing crop and mature and harvest same, but without any provision for foreclosure and without any right to sell said crop, does not violate the provisions of said Act against transferring or assigning the lessee's interest in the tract; and such cropping contract may lawfully be entered into between the lessee under said Act and a pineapple company (Opinion No. 1388 of October 28, 1926).

This opinion was overruled in 1941 which stated:

> A provision in a contract between homesteaders on Hawaiian home lands and a pineapple company giving the company a lien on growing crops and fruit together with a right to enter upon the land and to cultivate and harvest the crops in case of default is repugnant to section 208(5) of the Hawaiian Homes Commission Act, 1920, as amended (Opinion No. 1786 of October 21, 1941).

However, pineapple contracts were later upheld when: (1) the new contracts which were submitted to the Attorney General's Office excluded the objectionable features of the contract ruled upon in Opinion No. 1786; and (2) it seemed that the United States Congress, in amending sections 209 and 216 of the Hawaiian Homes Commission Act in 1937, had by implication ratified the contracts then in existence which included a lien on pineapple crops and a right to enter upon the homesteads. In that opinion the Attorney General reasoned that Congress must have ratified such contracts by

implication since such amendments were based on House Concurrent Resolution No. 22 of the 1937 session which in turn were based on the findings and recommendations of a Joint Hold-Over Committee which was established by the 1935 session of the Legislature to study thoroughly the Hawaiian homes program, including the cooperative block planting system (Letter Opinion of March 31, 1945; CNT:AH; 322:5849:20:25).

In 1955 the Attorney General reviewed all prior opinions and came to this conclusion:

> We have carefully reviewed the prior opinions of this office and it is our opinion that the three pineapple contracts now in existence between the homesteaders and Libby, Calpac and Pacific Pine are legal. We adopt and affirm the findings, conclusions and reasoning of the opinion rendered by Mr. Tavares (Letter Opinion dated March 31, 1945, above). After a careful consideration of all the references set forth by Mr. Tavares in his opinion, we are unable to avoid the conclusion that Congress must have considered the then existing cooperative block planting agreements in adopting its amendments to Secs. 209 and 216 of the Hawaiian Homes Commission Act, for Report No. 1138 of the Committee on the Territories in the House of Representatives, accompanying House Resolution 7374 in the 75th Congress recites expressly as follows: ". . . The purposes of this bill is to make various changes in the Hawaiian Homes Commission Act of 1920. The amendments are the result of nearly 2 years of study and discussions of the Hawaiian Homes project as in operation under existing law by the recently reorganized Hawaiian Homes Commission, and a hold-over committee of the Legislature of Hawaii, and was adopted by the legislature at its regular biennial session in 1937 and approved by the Governor. . . ." (underlining added) (Letter Opinion of March 29, 1955; RKF:mlk; 223:20:OLC:25).

On November 25, 1960, in the Circuit Court of the Second Circuit, in the case of Mrs. Victoria Kaeo Adolpho, et al., Plaintiffs, vs. Gladys L. Kealoha, et al., Defendants, Civil No. 243, the Court held:

> That the contract which forms the basis for this action, being pineapple block planting contract executed on July 31, 1957 by the defendant Gladys L. Kealoha and by other Hawaiian Homes Commission Homesteaders as planters, by California Packing Corporation as buyer, and by the Hawaiian Homes Commission, . . . is valid in all respects and does not violate any provision of the Hawaiian Homes Commission Act 1920, as amended.

Tax Exemption. The original lessee is exempt from all taxes for the first seven years from the date of the lease (s. 208(7), HHCA, 1920). The Attorney General has ruled that the issuance of a

new lease following the cancellation of an old lease makes the new lessee an original lessee entitled to the exemption (Opinion No. 911 of November 13, 1941). He has also specified that the exemption applies only to real property taxes (Opinion No. 356 of March 7, 1939). He has also ruled that the word "years" refers to ensuing taxation years rather than calendar years:

> Historically the legislative intent motivating Congress to pass such legislation was the paternalistic desire to provide a means for rehabilitation of the Hawaiian people. In construing the exemption, therefore, a liberal rather than a strict construction is preferred. . . . Likewise in interpreting the intent of Congress in providing that "the lessee shall be exempt from all taxes for the first five years from the date of the lease", it is consistent to construe the same as meaning an exemption from all property taxes for the first five taxation periods from the date of lease, especially in view of the use of the word "first", which denotes, not one period of five years from the date of the lease, in which event the exemption would undoubtedly read "for five years from the date of lease", but the first five ensuing taxation years (Opinion No. 1553 of January 25, 1930).
>
> (Note: The opinion refers to a five-year tax exemption period since the Act provided for that exemption period at the time the opinion was rendered but it was subsequently amended to seven years by Act of August 21, 1958, 72 Stat. 706, P. L. 85-710.)

Attachment and Execution. The interest of the lessee is not to be subject to attachment, levy or sale upon court process except: (1) in cases where the Department has approved a transfer, mortgage, pledge to, or holding for or agreement with a native Hawaiian or Hawaiians; or (2) for any indebtedness due the Department for taxes or for any other indebtedness the payment of which has been assured by the Department (s. 208(5), HHCA, 1920). The Attorney General gave emphasis to this provision when he stated:

> Section 208(5) specifically exempts lessee's interest from attachment, levy or sale upon court process except in connection with a mortgage or pledge to a qualified Hawaiian. We are of the opinion that a person who is not a qualified Hawaiian under the Hawaiian Homes Commission Act cannot subject the lessee's interest to attachment and execution (Letter Opinion of August 24, 1955; ENS:PH; 794:8:25).

However, in Yuen v. Hawaiian Homes Commission, 37 H. 8 (1944), the Supreme Court of the Territory of Hawaii held that a creditor could bring a creditor's bill against debtors who were lessees of the Hawaiian Homes Commission in a situation which involved the

following facts: (1) the debtor lessees involved had in existence contracts with pineapple companies under which they received payments; (2) the debtor lessees had assigned their payments over to the Commission but such assignments did not account for the full amount of the total payments to be paid; (3) it was the amount over and above the amount that was owed to the Commission by the debtor lessees that the petitioner was seeking to reach; (4) that in the lower court the debtor lessees defaulted but the Commission answered and contended (a) that a creditor's bill did not lie and (b) that if it did, the members of the Commission as public officers of the Territory were immune from suit; and (5) the trial judge sustained both of the contentions of the Commission and dismissed the bill. The court said:

> In our opinion a creditor's bill lies to subject the net proceeds of sales of pineapples by the debtor lessees under their contracts with the pineapple canneries over and above the existing statutory liens now in the possession of the commission to the payment of the judgments of the petitioner against the debtor lessees. . . .
>
> . . . The interests of the debtor lessees in the premises leased and improvement thereon under the provisions of section 208(6) of the Hawaiian Homes Commission Act of 1920, as amended are exempt from attachment, levy or sale upon process at the instance of the petitioner. The petitioner, as far as we know, is remediless at law. The commission certainly has not indicated any legal remedy by which the unsatisfied judgments against the debtor lessees, of which the petitioner is the judgment creditor may be otherwise satisfied. The bill of complaint contains all the allegations necessary to confer upon the circuit court jurisdiction in equity to proceed against any existing excess of the net proceeds of sales of pineapples in the possession of the commission of which the commission is trustee and the debtor lessees are the cestui que trustent. Hence the bill was improperly dismissed unless the commission as contended by it is immune from suit.

The court thereafter went on to hold that this was not a suit against the Territory since the suit was against the money and property of the debtor lessees held by the Commission in its private capacity as trustee for them and therefore immunity from suit did not exist.

Succession to Leases. Upon the death of a lessee, his interests in the tract and improvements, including growing crops (either on the tract or in any collective contract or program to which he is a party by virtue of his interest in the tract or tracts), are vested in his relatives by his designation or, in the absence of such designation, by selection by the Department either before or after the death of the lessee.

In order for the designation by the lessee to be valid, he must designate one or more of the following relatives as his successor: (1) husband or wife; (2) children; (3) widow or widowers of the children; (4) grandchildren; (5) brothers or sisters; or (6) nieces or nephews; which relative (or relatives) must be qualified to be a lessee of Hawaiian home lands except that such designated person (or persons) need not be 21 years of age. The designation must be in writing, must be specified at the time of the execution of the lease together with the right of such lessee to change his designation of beneficiary in a similar manner, and the designation must be filed with and approved by the Department (s. 209(1), HHCA, 1920).

The Act provides for one exception from the requirement that the successor be a qualified lessee--descendants of persons who were residents of Auwaiolimu, Kewalo-Uka and Kalawahine on Oahu on May 16, 1934 (s. 209(1), HHCA, 1920). The Attorney General noted:

> Public Law 841 waives . . . the condition requiring an applicant for Hawaiian homes lease to be a native Hawaiian. This waiver applies only to those who resided on the lands of Auwaiolimu, Kewalo-Uka, and Kalawahine on May 16, 1934 . . . who were bona fide residents at the time, who were not less than twenty-one years of age and to the descendants of those who leased such lands. It follows that a lessee who falls under this exception is treated as any other homesteader and therefore is entitled to all of the privileges provided under the provisions of the Hawaiian Homes Commission Act (Letter Opinion of March 6, 1956; PKM:lnc; 345:25:OLC).

The Attorney General has held that the term "children" includes stepchildren:

> A study of the provision (section 209) convinces me that the term "children" as used in the Act was intended to be used in a broad rather than a narrow sense. Certainly the relationship of a father to his stepchild is much closer than that of a man to his dead sister's widower . . . in my opinion a lessee may designate his stepchild to succeed to his interest (Letter Opinion of September 8, 1950; WDA:md; 109:25).

Further, it has been held that a designation, although included in a valid will and legally transmitted to the Commission after the death of the lessee, was sufficient compliance with the requirements of section 209(1) (Opinion No. 924 of November 14, 1941).

In the absence of a designation by the lessee which is approved by the Department and if one of the above-named relatives survives, the Department selects one or more of the relatives, in the order

named above, who are qualified to be lessees, as the successor or successors of the lessee's interest. If the selection is made before the death of the lessee, the lessee's interest vests at the time of death of the lessee. However, if the selection is made after the death of the lessee, the Department may make effective as of the date of death of the lessee, the rights to the use and occupancy of the tract by the successor (s. 209(1), HHCA, 1920).

The Attorney General has held that where the Commission is charged with the responsibility for selecting a successor it:

> . . . is vested with broad discretion under said section 209 of the Act to consider the qualifications of the persons representing the classes of relatives of the deceased lessee, as named for the purpose of succession in the statute, and to select therefrom that person who, in the judgment of the Commission, is most qualified for the purpose of succession to perform the conditions of the lease under the statute . . . . (Opinion No. 61-75 of July 19, 1961).

The Act provides for the appointment of guardians for successors who are minors by the Department, with the approval of a court of proper jurisdiction. Such a guardian must comply with the Act and stipulations and provisions of the lease. He need not be a native Hawaiian as defined in the Act (s. 209(3), HHCA, 1920).

The Attorney General has ruled that since section 209(1) provides that a successor lessee need not be over 21 years of age and since section 209(4) provides for the appointment of a guardian for a minor, it was the intention of Congress that a minor may properly be designated as a successor lessee (Opinion No. 924 of November 14, 1941). He has further held that since section 209(3) requires the appointment of a guardian only for persons who are minors and since Territorial law regarded a person who was 20 years of age as being sui juris, a guardian need not be appointed for a person who is 20 years of age (Letter Opinion of June 26, 1953; JRC:PH; 595:25).

If no relative is qualified to be a lessee of Hawaiian home lands, the land subject to the lease resumes its status as unleased Hawaiian home lands and may be leased by the Department to any native Hawaiian or Hawaiians as provided in the Act (s. 209(1), HHCA, 1920). In this event, the Department may issue a new lease according to the Attorney General:

> When a lessee of Hawaiian home lands dies leaving a will in which he names a successor to his tract and the will is duly probated, the leasehold would go to the person named by operation of the will, assuming, of course, that such a person is qualified to become a lessee, and it would

be unnecessary to have a new lease executed in such a case . . . .

In the event that a lessee died intestate the heirs named in section 209(1) would become entitled to the lessee's interest by operation of law, and the records of the administration of the estate would include, or should include, a determination of the heirs . . . .

In the event that a lessee of Hawaiian home lands died leaving no qualified successors, then the Commission would be in a position where it would be necessary to execute a new lease to the land held by the deceased lessee (Opinion No. 1371 of September 26, 1939).

CANCELLATION OF LEASES

Leases may be cancelled by the Department for violation of any provision of the lease or Act. Before cancellation, however, the Department must give due notice and afford the lessee an opportunity for hearing. If the Department, after such notice and hearing, finds the lessee in violation of any condition, it may declare the interest of the lessee in the tract and the improvements thereon forfeited and the lease cancelled. The Department then orders the lessee to vacate the premises and the right to the use and occupancy of the tract shall vest in the Department and it may take possession of the tract and improvements (s. 210, HHCA, 1920). The Department may enforce its order to vacate by bringing an action of ejectment or any other appropriate proceedings in the courts of the State (s. 217, HHCA, 1920). The Department is then authorized to either transfer the lease or to issue a new lease to any qualified Hawaiian, regardless of whether or not he is related by blood or marriage to the previous lessee (s. 209(2), HHCA, 1920).

The importance of due notice in the cancellation of leases was emphasized in Hawaiian Homes Commission v. Bush & Horcajo, 43 H. 281 (1959) when it was held that:

> The acceptance of rent by the Commission after knowledge of a breach of covenant constitutes a waiver of the right of forfeiture for such breach and where the Hawaiian Homes Commission failed to notify the lessee to appear at a meeting at which the Commission purported to cancel his lease for nonpayment of amounts due under the provisions of the lease, and at which meeting the lessee was not present, such action is void for failure to give notice of the hearing and opportunity to be heard as required by section 210 of the Hawaiian Homes Commission Act.

The Attorney General has ruled that where the Commission cannot obtain personal service upon the lessee, then the notice of cancellation must be published in accordance with the requirements of service by publication in court proceedings (Letter Opinion of June 2,

1939; JW:AJ; 758:25).

The Attorney General has emphasized that a cancellation must be based on a violation of the lease or the Act:

> There is nothing in the statute or in the lease which would give the Hawaiian Homes Commission the right to cancel a homesteader's lease merely on the grounds of his being imprisoned.
>
> . . . Where a homesteader fails to continue to use, occupy and cultivate his homestead the Hawaiian Homes Commission may cancel his lease, and the fact that such failure was due to the "forced" absence of the homesteader would not in law justify or excuse the breach of condition, except where the Commission itself prevents the fulfillment thereof (Opinion No. 1638 of April 6, 1936).

A financial reckoning is to take place following cancellation of a lease:

> . . . the Commission should determine the value at the time of such cancellation of the improvements and any personal property placed upon the premises by the lessee and taken over by the Commission. If this value equals or exceeds the amount of the lessee's then outstanding indebtedness to the Commission, the debt should be cancelled and the amount of any excess repaid to the lessee; but if such value is less than the amount of such indebtedness, the Commission should proceed to collect from the lessee the amount of the difference between these two figures, giving him credit for the amount of such value on account of his debt (Opinion No. 1571 of June 8, 1931).

SURRENDER OF LEASES

The right of a lessee to surrender his lease to the Department is made implicit in the Act (see ss. 209(1), 209(2), 215(3), HHCA, 1920). As in the case of cancellation of the lease, the Department may transfer the lease or issue a new lease to any qualified Hawaiian regardless of whether or not he is related by blood or marriage to the previous lessee (s. 209(2), HHCA, 1920).

A surrender must be by agreement. Once there is agreement, the Commission assumes the obligation to pay the lessee the net value of his leasehold:

> To constitute a surrender, there must be an agreement between the landlord and tenant, the latter yielding possession to the landlord, or lessor, and an acceptance thereof by the landlord or lessor. The concurrence of both parties is required in order to put an end to the agreement.

> You are therefore advised that the Commission may in its discretion either accept or reject the lessee's offer to surrender the leasehold. However, it must be borne in mind that if the Commission does accept the surrender that under the provisions of section 209 of the Hawaiian Homes Commission Act it must have the value of the improvements on the property appraised and pay to the lessee the value thereof less any indebtedness due the Commission, or for taxes, or for any other indebtedness the payment of which has been assured by the Commission (Opinion No. 238 of April 11, 1938).

Further, the Commission is obligated to pay all real property taxes which may be due:

> The Hawaiian Homes Commission has the right, and indeed the duty, to deduct from the payment made upon the surrender of a lease, the amount of the homesteader's indebtedness for real property taxes. Reference is made to section 208, paragraph (6), section 209, fourth paragraph, and section 216. These sections require the payment of taxes by the homesteader, and provide that if the Hawaiian Homes Commission pays them the taxes it constitutes a lien. However, in the case of a voluntary surrender, section 209 makes it a duty of the Commission to deduct the taxes, whether or not the Commission has previously paid the taxes. (Letter Opinion of February 10, 1954; RVL:rs; 706:25,45:OLC).

The opinions governing surrender of leaseholds with pineapple crops growing thereon are in a similar vein. Opinion No. 61-66 of June 20, 1961 holds that in the case of surrender of a leasehold with pineapple crops growing thereon, the Commission should secure an appraisal of the value of the crops and pay to the lessee the value of the crops less any indebtedness for taxes or for other debts, payment of which has been assured by the Commission. If further payments are due, the Attorney General has held:

> Obviously, any lessee who surrenders his lease to the Commission ceases, from the date of such surrender, to have any further right to continue to receive from the pineapple company monthly "advances" for expenditures to be made for cultivation of pineapple crops upon the tract surrendered. Hence, any money which the pineapple company turns over to the Commission for such "advances" for any tract, if made for the period during which the tract has been surrendered by the previous lessee, should be retained by the Commission in the special account for such further disposition thereof as may be determined hereafter to be proper.
>
> Any amount which the pineapple company offers to turn over to the Commission as such "excess" over advances for planting expenditures and for taxes on account of any such tract may be equitably calculated and proportionately distributed in such manner that each of the above-named previous lessees would receive an equitable portion thereof, as his or her share, of such "excess" up to the date of the surrender of

the lease (Opinion No. 61-88 of September 6, 1961).

APPRAISAL OF LESSEE'S INTEREST

Upon the death of a lessee without a relative qualified to be a lessee, or upon cancellation of a lease by the Department, or upon surrender of a lease by the lessee, the Department is obligated to appraise the value of all improvements and growing crops and to pay to the previous lessee or his legal representative the value thereof less any indebtedness owed to the Department because of taxes or for any payment which has been assured by the Department. Such payment shall be made from the loan fund and shall be considered as an advance to be reimbursed from payments made by the successor to the tract involved. The appraisal is to be made by three appraisers--one named by the Department, one named by the previous lessee or the legal representative of a deceased lessee, and the third selected by the two appointed appraisers (s. 209(1), HHCA, 1920).

The Attorney General has ruled:

> The foregoing provisions (sections 209 and 215) of the law appear to authorize the Commission to pay to the executrix . . . the appraised value of improvements upon her tract and growing crops, less any indebtedness due the Commission or for taxes or any indebtedness of the deceased, payment of which has been assured by the Commission . . . . The Commission ought not to guarantee that pineapple crops over a period of three or four years will be harvested and sold without having some assurance that it will be reimbursed if it now makes payment to the executrix of the present appraised value of those crops . . . . (Opinion No. 771 of June 6, 1939).

Where a lessee died leaving improvements on the tract but without designating a successor, payment to the legal representative must be made (Opinion No. 61-75 of July 19, 1961).

Where a lessee surrenders his lease but has outstanding a block planting agreement, the Department has to appraise the growing pineapple crops as of the date of surrender (Opinion No. 61-66 of June 20, 1961). The lessee under such circumstances is entitled to an equitable portion of the excess over advances but he is not entitled to advances paid by the pineapple company after the date the lease is surrendered (Opinion No. 61-88 of September 6, 1961).

COMMUNITY PASTURES

The Act provides that the Department, when practicable, shall

provide community pastures adjacent to each district in which agricultural lands are leased (s. 211, HHCA, 1920).

LICENSES

The Department is authorized to grant licenses, not exceeding a term of 21 years to public utility companies or corporations as easements for railroads, telephone lines, electric power and light lines, gas mains and the like (s. 207(c)(1), HHCA, 1920).

Licenses, within districts of leased lands, may also be granted to: (a) churches, hospitals, public schools, post offices, and other improvements for public purposes; and (b) theatres, garages, service stations, markets, stores and other mercantile establishments which are owned by the lessees of the Department or by organizations which are formed and controlled by the lessees (s. 207(c)(1), HHCA, 1920).

However, the Hawaiian Homes Commission does not have the authority to issue revocable licenses to: (a) the County of Maui for Kiowea Park on the Island of Molokai (Letter Opinion of January 26, 1956; PKM:lnc; 237:25:OLC); or (b) a lessee for a fish pond (Letter Opinion of July 11, 1956; PKM:lnc; 880:25:OLC); or (c) a person who wanted to live on undeveloped Hawaiian home lands on a month-to-month basis (Opinion No. 61-64 of June 9, 1961); or (d) a mortuary since it is not a mercantile establishment (Letter Opinion of June 17, 1955; AO:ph; 554:25).

The Attorney General has also ruled that in cancelling or revoking a license, the Commission must notify the lessee that the license is cancelled but it need not give any reason for such cancellation (Letter Opinion of March 16, 1938; JW:aj; 138:25).

With the approval of the Governor, the Department is authorized to grant licenses to the United States for terms not to exceed five years for reservations, roads, and other rights-of-way, water storage and distribution facilities and practice target ranges. Such licenses may be extended from time for periods of three years with the approval of the Governor. Such licenses, however, may not be granted by the Department if it interferes with the Department's operation or with its maintenance activities (s. 207(2), HHCA, 1920).

In defining the term "reservation", the Attorney General held that the term could be construed to include use by the Federal Aviation Agency of homestead land in Hoolehua for the establishment and operation of an International Flight Service Receiver Station

which receives aircraft information transmitted from stations in other parts of the world (Letter Opinion of October 12, 1960; DYM:lnc; 956:IX).

In the case of licenses for rights-of-way for pipelines, tunnels, ditches, flumes and other water conveying facilities, reservoirs and other storage facilities, and for development and use of water appurtenant to Hawaiian home lands, licenses may be granted by the Commission to the Hawaiian Irrigation Authority or to any other agency of the State or United States undertaking construction and operation of irrigation projects for a term of years longer than is required for the amortization of the cost of the project or projects if such longer grant is approved by an act of the State Legislature (s. 220, HHCA, 1920).

RETURN OF LANDS TO THE DEPARTMENT OF LAND AND NATURAL RESOURCES

The Department is authorized to return to the Board of Land and Natural Resources any available lands which are not immediately needed. Such lands may be leased by the Board in accordance with section 73(d) of the Organic Act which provides for leases for periods up to 65 years by public auction to the highest bidder. Every such lease must contain a withdrawal clause which provides that the lands may be withdrawn at the option of the Department by giving not less than one nor more than five years' notice of such withdrawal and such leases may be withdrawn by the Department in accordance with the notice period specified in the lease (s. 204(2), HHCA, 1920).

The Department is also authorized to return to the Board of Land and Natural Resources any Hawaiian home lands which are not leased to native Hawaiians. Such lands resume the status of public lands but may not be disposed of by the Board except by general lease. Every such lease is subject to termination by the Board upon notification by the Department, with the approval of the Secretary of the Interior, that the lands are needed for leasing or for community pastures (s. 212, HHCA, 1920).

It should be noted that there is an apparent conflict between the provisions of sections 204(2) and 212 regarding the withdrawal of lands returned to the Board of Land and Natural Resources. Under section 204(2), lands may be withdrawn only after the Department gives not less than one nor more than five years' notice of such withdrawal, whereas under section 212, lands may be withdrawn at any time with

the approval of the Secretary of the Interior. In attempting to reconcile the apparent conflict, the Attorney General stated:

> . . . In our opinion, therefore, the following is the proper interpretation of the two provisions last mentioned. In case available lands are turned back to the Commissioner of Public Lands, the Hawaiian Homes Commission may recover the same at any time, for its purposes upon giving notice to the Commissioner of Public Lands, with the approval of the Secretary of the Interior, in accordance with section 212. If, on the other hand, the Secretary of the Interior refuses to give his approval or if the Commission does not wish to ask for the same, then it may recover such land by giving five year's notice to the Commissioner of Public Lands without the approval of the Secretary of the Interior. In this way we give full effect to both of these provisions by a reasonable construction of each (Opinion 1515 of November 27, 1928).

The Attorney General elaborated on the method of withdrawal in a situation which involved lands occupied by former lessees under revocable permits and already advertised for lease by the Commissioner of Public Lands, by stating:

> As respects the general authority of the Hawaiian Homes Commission to withdraw "available lands" under lease from the control of the Commissioner of Public Lands, we refer you to our opinion No. 1515, dated November 27, 1928. Except to point out that section 204 of the Hawaiian Homes Commission Act, 1920, was further amended on July 10, 1937 (50 Stat. 503) (to provide in lieu of the required five years' notice of withdrawal a notice "not less than one nor more than five years'"), the opinion correctly expresses the governing law.
>
> It is significant to note, however, that the available lands currently under dispute are not under lease Though they are occupied, the occupants are mere licensees whose continued privilege of occupancy is at the will of the Commissioner. There has been no transfer of public lands to such occupants; there are no premises to be recovered by the Commissioner. Letter Opinion 4231:37,47C, dated September 4, 1944. Under such circumstances, neither the consent of the Secretary of the Interior nor a notice of not less than one nor more than five years is a necessary condition precedent to the withdrawal of lands by the Hawaiian Homes Commission. Letter Opinion 3499:25,37, dated February 22, 1944. All that is required is a simple notice in writing, addressed to the Commissioner of Public Lands signifying the intention of the Hawaiian Homes Commission to effect an immediate withdrawal of land.
>
> As we see it, the crux of the matter is whether or not the Hawaiian Homes Commission has given you formal notice of the withdrawal of the disputed Items. This is important for the reason that as long as the Items are subject to your control the Hawaiian Homes Commission has no authority to dictate to you with respect to your disposition of such Items. The sole control, if it can be considered such, of the Hawaiian

> Homes Commission over you, is the authority to effect withdrawals in accordance with the law Until such withdrawals are effected, the matter of the proper management of such Items is your responsibility (Letter Opinion of February 9, 1951; FWH:md; 647:57:25).

The Attorney General also noted that the Commission may not attach a restriction on the use of the land which the Commission plans to return to the control of the Commissioner of Public Lands since section 212 of the Act provides that unleased lands when returned to the Commissioner of Public Lands resumes and maintains the status of public lands which may be disposed of by general leases only (Opinion No. 1618 of November 10, 1939).

SETTING ASIDE HAWAIIAN HOME LANDS BY EXECUTIVE ORDERS

The ability of the Governor to set aside Hawaiian home lands which have been returned to the Commissioner of Public Lands has been the subject of many opinions. An opinion in 1925 held:

> . . . the Governor does not possess the power to set aside by executive order a section of Hawaiian home lands for the purpose of establishing an aviation station by the United States Aviation Corps in Hawaii (Opinion No. 1290 of December 18, 1925).

However, that opinion was impliedly reversed in 1927 when the Attorney General held:

> Unleased Hawaiian home lands, returned to the Commissioner of Public Lands pursuant to section 541, R.L.H. 1925, may thereafter be set aside by Executive Order for use as a Territorial Aviation Field, since such lands are not thereby "disposed of" within the meaning of said Section, the "disposition" therein referred to meaning a final disposition and not a mere change of use under a revocable order.
>
> Such unleased lands, so returned to the Land Commission and thereafter set aside by Executive Order for a public use, are nevertheless . . . subject to compulsory return to the Hawaiian Homes Commission if and when said Commission, with the approval of the Secretary of the Interior, gives notice that such lands are required by it (Opinion No. 1457 of November 28, 1927).

The above opinion was further clarified by a letter opinion in 1944 which stated:

> While section 204(2) merely provides that Hawaiian home lands returned to the Commissioner of Public Lands may be leased by him, and does not contain any general authorization to the Commissioner of Public Lands to otherwise manage the property so placed in his

> control, Section 212 does contain the general provision that such land "shall***resume and maintain the status of public lands" and there then follows a provision "except that such lands may be disposed of under a general lease only". This provision was interpreted by Attorney General Lymer as permitting any use of land which ordinarily could be made of public lands, short of a final or binding disposition, that is as not prohibiting a change of use under a revocable order. Ops. Atty. Gen. (1927-1928) No. 1517, by Attorney General Hewitt. Both of these opinions involved a revocable executive order but as between such an executive order and a revocable license, I see no material difference (Letter Opinion of February 22, 1944; RVL:GG; 3499:25:37:OLC).

LAND EXCHANGES

The Department, with the approval of the Governor and the Secretary of the Interior, may exchange title to available lands for public lands of equal value for the following purposes: (a) to consolidate its holdings; or (b) for sites for reservoirs and subsurface water development wells and shafts; or (c) to better effectuate the purposes of the Act. Such exchanges are not subject to the provisions of section 73(1) of the Organic Act and the land laws of Hawaii in relation to area and value of land that may be exchanged (40 acres or $15,000 in value--see also section 99-42, R.L.H. 1955, as amended) but such exchanges must be approved by two-thirds of the members of the Board of Land and Natural Resources. The public lands received by the Department in such exchanges assume the status of available lands and the available lands exchanged assume the status of public lands (s. 204(4) and 220, HHCA, 1920).

Relinquishment of Title. The Department may not relinquish title to its lands even though they are to be used for public purposes. When asked whether or not the Commission was authorized to relinquish title to certain roadways on Hawaiian Homes Commission lands, the Attorney General replied as follows:

> . . . The Hawaiian Homes Commission cannot relinquish title to the lands involved. See Op. Atty. Gen. No. 1290 . . . . The Hawaiian Homes Commission is without power to transfer the area involved for road purposes (Opinion No. 276 of March 4, 1940).
>
> . . . Neither the county nor the Territory may acquire title to roadways on lands under the jurisdiction of the Hawaiian Homes Commission (Letter Opinion of November 17, 1953; ENS:md; 211:8:25).

However, the Attorney General suggested that the following method may be employed in turning over jurisdiction of an area to a county:

> Your Commission should adopt a resolution returning this area to the

> control of the Commissioner of Public Lands. The Commissioner of Public Lands in turn should prepare for the Governor's signature an executive order setting the land aside under the control of the Park Board. Since such an executive order is revocable it does not constitute a "disposition" of the lands and may be issued under Section 212 of the Hawaiian Homes Commission Act. This was the ruling of Attorney General Lymer, November 28, 1927, Ops. Atty. Gen. (1927-1928) No. 1457 (Letter Opinion of September 11, 1945; RVL:GG; 876:25:OLC).

Eminent Domain. The lands of the Hawaiian Homes Commission are not subject to eminent domain proceedings by a public utility company. The Attorney General said:

> . . . It is the general rule of law that a private corporation, to whom the power of eminent domain has been delegated, may not condemn public lands unless there is specific legislative authorization or necessary implication. The reasoning for this rule is that such a condemnation will destroy or interfere with the property already devoted to public use. 1 Nichols, The Law of Eminent Domain, 132, paragraph 2.2; 18 Am. Jur. 713, paragraph 83. No provisions are found in either the Revised Laws of Hawaii 1955, as amended, or the Hawaiian Homes Commission Act authorizing such an ability to condemn by public utility companies (Opinion No. 60-77 of July 7, 1960).

LAND AND HOUSING DEVELOPMENT

In order to promote the development of land and the erection of homes, the Department is authorized to make loans to: (a) lessees of any tract; (b) the successor in interest of the lessee; and (c) any agricultural cooperative association, if all members of such association are lessees (s. 214, HHCA, 1920).

Besides the loan activities of the Department, the Department is authorized to: (a) hire agricultural experts to instruct and advise the lessees or their successors as to the best methods of diversified farming and stock raising at an annual compensation not exceeding $6,000 which is to be paid by the Department (s. 219, HHCA, 1920); (b) construct sewage facilities and roads through and over Hawaiian home lands (s. 213(c), HHCA, 1920) provided, that roads other than federal-aid highways must be maintained by the county or the city and county in which the roads are located (s.220, HHCA, 1920); (c) engage in any activities which it deems necessary to assist the lessees in obtaining the maximum utilization of the leased lands for their farming and ranching operations and the marketing of their agricultural produce and livestock (s. 219.1, HHCA, 1920); and (d) directly undertake and carry on developmental projects and activities in respect to Hawaiian home lands having to do with the

economic and social welfare of the homesteaders and to derive revenues from the sale of products from such projects or activities (s. 220, HHCA, 1920).

CONDITIONS OF LOANS

Each loan, whether or not stipulated in the contract of loan, is subject to the following conditions:

(1) Loan Maximums for Agricultural, Pastoral or Residence Lots. The amount of a loan for any lessees or successor or successors in interest may not exceed $15,000 to the occupant of a tract of agricultural or pastoral land for the erection of a dwelling house, the purchase of livestock and farm equipment or for other costs of development of farm and ranch operations; or may not exceed $10,000 to the occupant of a residence lot. However, loans for the cost of breaking up, planting and cultivating land and harvesting crops, the purchase of seed, fertilizers, feeds, insecticides, medicines and chemicals for disease and pest control for animals and crops, and related supplies required for farm and ranch operations, the erection of fences and other permanent improvements for farm and ranch purpose and the expenses of marketing are without limit (s. 215(1), HHCA, 1920). In construing the term "farm equipment" as used in section 215, the Attorney General held:

> . . . The term "farm equipment" would mean, in my opinion such equipment as is directly necessary to properly and efficiently carry on farming operations upon the land leased. These operations may consist in producing crops, livestock or both, but would not include manufacturing operations, as the canning of pineapples. All tools, implements, utensils, and apparatus necessary for such lines of work would be included within the expression "farm equipment" (Opinion No. 1168 of September 23, 1924).

Both Opinion No. 1168 of September 23, 1924 and Letter Opinion of October 22, 1938; JW:AJ; 877:25 agree that farm equipment may be collectively purchased by lessees from loans made by the Commission with each lessee retaining a share of ownership in the equipment. It has also been held that the maximums for loans stated in section 215(1) means that the loans may not exceed the maximums at any one time but where the lessee has borrowed the maximum and has repaid on installments on account, the Commission may make additional loans from time to time which does not exceed the maximums specified in the section (Letter Opinion of March 16, 1938; JW:AJ; 143:25).

(2) Loan Maximums for Agricultural Cooperatives. For agricultural cooperatives, the amount of the loan is to be determined by the Department on the basis of proposed operations and the securities available (s. 215(1), HHCA, 1920). Prior to amendment of this section, the Attorney General ruled that the Hawaiian Homes Commission was without power to guarantee a loan for a private enterprise incorporated by the homesteaders for their own convenience (Hoolehua Co., Ltd.) which was operating under a license on Hawaiian home lands (Opinion No. 897 of November 10, 1941).

(3) Installments. Loans are to be repaid in periodic installments (monthly, quarterly, semi-annually or annually) as determined by the Department (s. 215(2), HHCA, 1920).

(4) Term. Loans must not exceed a term of 30 years (s. 215(2), HHCA, 1920).

(5) Acceleration of Repayment. Loan repayment may be accelerated at any time at the option of the payer (s. 215(2), HHCA, 1920).

(6) Interest. All unpaid balances of principal accrues interest at the rate of 2-1/2 per cent per annum and shall be payable periodically or upon demand as determined by the Department (s. 215(2), HHCA, 1920). In construing this section, the Attorney General held that interest is usually payable from the date of the loan but when the date of the loan is prior to an accounting to determine the exact amount owed by each lessee, the date of the accounting determines the date from which interest accrues (Opinion No. 1399 of December 10, 1926).

(7) Assumption of Loans. Assumption of loans may occur in any one of the following ways: (1) in case of death of the lessee, the successor assumes the contract of loan, without limitation; or (2) in case of cancellation of a lease by the Department or a surrender of lease by the lessee, the Department may, at its option declare all installments on the loan due and payable, or permit the successor of the tract to assume the contract of loan, without limitation (s. 215(1) and (2), HHCA, 1920). It has been previously held that the Hawaiian Homes Commission could hold a successor lessee liable for the outstanding loan of the prior lessee who surrendered his lease even though the outstanding indebtedness exceeded the appraisal value of the improvements on the land (Letter Opinion of February 5, 1954; HYT:AH; 673:25).

(8) Diversion of Moneys. No part of the moneys loaned may be devoted to any purpose other than those for which the loan is made (s. 215(4), HHCA, 1920).

(9) Loan Contract Conditions. The borrower or his successor must comply with such other conditions, not in conflict with any provision of the Act, which the Department may stipulate in the contract of loan (s. 215(5), HHCA, 1920).

(10) Lease Conditions. The borrower or his successor must comply with all of the conditions contained in the lease (s. 215(6), HHCA, 1920).

POSTPONEMENT AND WRITE-OFF

The Act provides that the Department, with the concurrence of a majority of the Commission, may postpone due and delinquent payments of a previous lessee or write off and cancel, in whole or in part, the contract of loan of a previous lessee where the loan is delinquent and deemed uncollectible. However, in the case of a postponement, such postponed payment continues to bear interest at the rate of 2-1/2 per cent and in the case of a write-off or cancellation, the improvements and growing crops on the tract must be first appraised (s. 215(2) and (3), HHCA, 1920).

The Attorney General ruled that although the Commission may reduce or write-off the indebtedness of a lessee who quit his homestead to the value of the improvements at the time the homestead is accepted by a subsequent lessee, the Commission must first make every possible effort to collect the amount owed by the prior lessee before it may write off the loss as an uncollectible account (Opinion No. 344 of March 4, 1939).

SECURITY FOR REPAYMENT OF LOANS

In order to protect its loans, the Department may require a delinquent borrower to execute an assignment for an amount equal to the indebtedness owed to the Department as assured by the Department to others. Such assignment may include all moneys due or to become due to such delinquent borrower from any agreement or contract to which the borrower is a party. If the borrower refuses to execute such an assignment when requested, the Department may cancel his lease or interest therein (s. 215(3) and (7), HHCA, 1920).

Such an assignment has been held to have priority over a subsequent garnishment:

> The contract entered into between the homesteader and the Commission expressly provides, for the purpose of enabling the homesteader to obtain

> credit, a clause that all moneys due or to become due the homesteader shall be collected by the Homes Commission for the purpose of liquidating the indebtedness of the homesteader, hence any assignment made by a homesteader which has been approved by the Commission has priority over all subsequent garnishment proceedings or claims of any nature whatsoever (Opinion No. 1621 of January 29, 1936).

In addition to such an assignment, the Department may: (a) require the borrower to insure, in such amount as the Department may determine, any livestock, machinery, equipment, dwellings and permanent improvements purchased or constructed out of moneys loaned by the Department or in lieu thereof to purchase such insurance directly and charge the cost thereof against the principal payable by the borrower;[2] and (b) after notice and hearing, cancel the lease and declare all principal and interest of the loan immediately due and payable for any violation of the conditions of the loan (s. 216, HHCA, 1920).

The Department is also given a first lien upon the borrower's or lessee's interest in any lease, growing crops, either on his tract or in any collective contract or program, livestock, machinery and equipment purchased with moneys loaned by the Department, and in any dwellings or other permanent improvements on any leasehold tract. Such lien is for an amount equal to all principal and interest due and unpaid, all taxes and insurance and improvements paid by the Department, and all indebtedness of the borrower which have been assured by the Department. This lien has priority over any other obligation for which the property subject to the lien may be security. The Department may foreclose on the lien and order the premises vacated and the property subject to the lien surrendered. Upon such foreclosure, the right to the use and occupancy of the property revests in the Department subject to the payment by the Department of the difference, if any, between the indebtedness and the value of the property to the lessee (s. 216, HHCA, 1920).

The Attorney General has held that the Department may not waive its statutory right of first lien since section 216 is a mandatory grant of power designed to protect the funds entrusted to the Commission (Opinion No. 60-85 of July 21, 1960). That office also held that lien provisions of the Act prohibits: (a) the sale of buildings and quonset huts to Hawaiian homes lessees on conditional sale agreements since such buildings become fixtures when placed on the land and since neither the conditional seller nor the lessee or the Commission may remove them or agree to remove them (Letter Opinion of January 7, 1954; HTY:md; 465:25); and (b) the State may not issue improvement bonds which provide for a lien against Hawaiian home lands as a security for repayment since a lien could constitute a disposition

of the land not provided for by sections 204, 207 and 212 of the Act (Opinion No. 63-25 of April 19, 1963).

The Department is empowered to enforce its orders by: (a) bringing an action of ejectment or other appropriate proceedings in the courts; or (b) invoking the aid of the appropriate circuit court and in such case, the circuit court must order the lessee or his successor to comply with the order and upon failure of the lessee to comply with such order, such court may punish such lessee by contempt proceedings (s. 217, HHCA, 1920).

FARM LOAN ACT

The Act declares that the lessees and their successors are ineligible for loans under the Farm Loan Act of Hawaii approved on April 30, 1919 (s. 218, HHCA, 1920). However, there still remains some question as to whether or not that provision prohibits the lessee or his successor from obtaining loans under the present Farm Loan Act.

WATER DEVELOPMENT

The Act grants the Department the authority to:

(1) directly undertake and carry on water development projects in respect to Hawaiian home lands and to sell such water to non-homesteaders (s. 220, HHCA, 1920);

(2) grant licenses for rights-of-way, with the approval of the Governor, to state and federal agencies undertaking irrigation projects for pipelines, tunnels, ditches, flumes and other water conveying facilities, reservoirs and other storage facilities, and for the development and use of water appurtenant to Hawaiian home lands, for a term no longer than is required for the amortization of the cost of such project and if the Department wishes to grant a longer term, such grant must be approved by an act of the State Legislature (s. 220, HHCA, 1920);

(3) exchange available lands for public lands for sites for reservoirs and subsurface water development wells and shafts (s. 220, HHCA, 1920);

(4) request any state or federal irrigation agency to organize irrigation projects for Hawaiian home lands

and to transfer irrigation facilities constructed by the Department to such agency (s. 220, HHCA, 1920);

(5) agree to pay, from the Hawaiian Home Operating Fund, the tolls and assessments made against community pastures for irrigation water (s. 220, HHCA, 1920)

(6) agree to pay, from the Hawaiian Home Operating Fund, the costs of construction of projects constructed for Hawaiian home lands if such projects were constructed at the request of the Department, and if the assessments paid by the homesteaders upon the lands are insufficient to pay such costs (s. 220, HHCA, 1920);

(7) use free of charge, upon demand, so much surplus water which the Department deems necessary to supply adequately the livestock or the domestic needs of the individuals upon any tract from (a) any water covered by water license issued after the passage of the Act (July 9, 1921), (b) any government water not covered by a license, or (c) any water covered by a water license issued prior to the passage of the Act if such license contained a reservation of such water for the benefit of the public (s. 221, HHCA, 1920);

(8) contract or acquire by eminent domain proceedings in its own name the right to use any privately owned surplus water or government owned surplus water covered by a water license issued previous to the passage of the Act and not containing a reservation of such water for the benefit of the public (s. 221, HHCA, 1920);

(9) use free of charge for irrigation purposes, any surplus water of the Waimea tributary on the Island of Kauai (s. 221, HHCA, 1920); and

(10) credit against charges made against the Hawaiian Homes Commission and its lessees any funds contributed by the Congress as a grant-in-aid for the construction of the Molokai irrigation and water utilization system which are not required to be reimbursed (s. 221, HHCA, 1920).

Surplus water is defined in section 221 as being:

> . . . so much of any government-owned water covered by a water license or so much of any privately owned water as an excess of the quantity required for the use of the licensee or owner, respectively.

In determining the ability of the Department of Hawaiian Home Lands to contract with the Department of Land and Natural Resources

to guarantee the payment of the homesteaders' obligations for water charges, the Attorney General said:

> . . . Obligations referred in the letter would cover assessments to be paid by the homesteaders for their share of the cost of construction of the project to serve homestead lands. If this be correct, then there is no room for doubt as to the authority of the Hawaiian Homes Commission to enter into a contract guaranteeing payment of the homesteaders' share of the cost of construction of the project, in the event any of the homesteaders fail to pay their share of assessments for the construction of the improvements under the project. That authority is clearly stated in section 220 of the Hawaiian Homes Commission Act, 1920, as amended . . . . (Opinion No. 61-22 of February 3, 1961).

In addition, the provisions of section 87-4 of the Revised Laws of Hawaii 1955, as amended, provides that upon a showing of actual need for domestic and agricultural water to the Department of Land and Natural Resources, the Hawaiian Homes Commission has a prior right to two-thirds of the water developed in the Molokai Irrigation and Water Utilization Project.

To further aid the Department in its water development projects, the Act provides that the Secretary of Interior shall designate from his Department someone experienced in sanitation, rehabilitation and reclamation work to reside in the State and to cooperate with the Department in carrying out its duties. The salary for such person, however, must be paid by the Department and it must not exceed $6,000 per annum (s. 224, HHCA, 1920).

FINANCES

The operations of the Department are financed from two revolving funds (Hawaiian home-loan fund and the Hawaiian home-operating fund) and two special funds (Hawaiian home-development fund and the Hawaiian home-administration account) which are all located in the treasury of the State (s. 213(a), HHCA, 1920).

HAWAIIAN HOME-LOAN FUND
(s. 213(b), HHCA, 1920)

The sources of revenue for this fund are as follows: (a) 30 per cent of the receipts derived from the leasing of cultivated sugar cane lands or from water licenses; (b) installments of principal paid by lessees or their successors on loans or advances made by the Department from this fund; and (c) funds appropriated to this fund by the Legislature pursuant to section 220.

Expenditures from this fund may be made for: (a) loans to lessees, their successors and to agricultural cooperatives; (b) advances paid by the Department pursuant to section 209(1); (c) transfers of 25 per cent of the annual receipts to the Hawaiian home-development fund; and (d) loans to the Hawaiian home-operating fund.

The maximum that this fund can receive from receipts derived from the leasing of sugar cane lands and water licenses is $5,000,000.[3]

Since the purposes of expenditure from the fund are specified in the Act, the Attorney General has held that without the approval of Congress, neither the Legislature nor the Treasurer may either appropriate or make a temporary advance to the Hawaiian home-loan fund which is conditioned upon the subsequent repayment from that fund (Letter Opinion of May 7, 1953; FWH;md; 346:20:25 and Letter Opinion of July 17, 1953; RBG:AH; 703:46:25).

HAWAIIAN HOME-DEVELOPMENT FUND
(s. 213(c), HHCA, 1920)

The sources of revenue for this fund are: (a) 25 per cent of the amounts covered into the Hawaiian home-loan fund annually; (b) excesses in the Hawaiian home-administration account which is the amount, if any, over and above the amount approved by the Legislature for expenditure (s. 213(f)(3), HHCA, 1920); and (c) funds appropriated by the Legislature pursuant to section 220.

Expenditures from this fund, with the prior approval of the Governor, may be made for (a) the construction of non-revenue producing improvements including sanitary sewage facilities, roads through and over Hawaiian home lands, and others; and (b) matching federal, state and county funds for the construction of projects (s. 213(e), HHCA, 1920).

HAWAIIAN HOME-OPERATING FUND
(s. 213(d), HHCA, 1920)

The sources of revenue for this fund are: (a) all moneys received by the Department from any other source, except moneys received from the home-administration account, but including interest from loans and interest from investments; (b) loans made to this fund from the Hawaiian home-loan fund; and (c) funds appropriated to this fund by the Legislature pursuant to sections 213(d) and 220.

Expenditures from this fund may be made for: (a) the construction and reconstruction of revenue-producing improvements, including the acquisition of interests in real property, water rights and others; (b) the payment into the treasury of the State of such amounts as are necessary to meet the interest and principal costs of bonds issued for such improvements; (c) the operating and maintenance of improvements constructed; (d) the purchase of water or other utilities, goods, commodities, supplies or equipment and for services to be resold, rented, or furnished on a charge basis to occupants of Hawaiian home lands; (e) matching federal, state and county funds for the construction of projects (s. 213(e), HHCA, 1920); and (f) the development and water projects authorized by sections 220 and 221.

This fund is authorized to borrow money from the Hawaiian home-loan fund if: (a) the approval of the Governor is first obtained; (b) the repayment can be made in not more than ten annual installments; and (c) the aggregate amount of such transfers outstanding at any one time does not exceed $500,000.

In construing the provisions of section 213, the Attorney General has held that the Commission is authorized: (a) to pay for damages incurred by a private corporation for destruction of its pineapple crop when the Commission extended a pipeline easement from five feet to twenty-five feet wide since the funds appropriated for improvements may be used to acquire necessary lands and rights-of-way (Letter Opinion of June 20, 1944; RVL:GG; 3922:25 citing Ops. Atty. Gen. (1915) No. 463); and (b) to expend money for the installation of fire hydrants since fire hydrants are necessary in providing water to homesteaders for fire protection (Letter Opinion of December 15, 1945; RVL:GG; 1285:14:25:OLC).

However, section 213 does not authorize the Commission to: (a) use the development and operating fund for the development of a demonstration farm (Letter Opinion of January 10, 1956; PKM:lnc; 178:25:OLC); or (b) subsidize the continuation of nursery schools (Opinion No. 62-6 of January 22, 1962).

HAWAIIAN HOME-ADMINISTRATION ACCOUNT
(s. 213(f), HHCA, 1920)

The sources of revenue for this fund are: (a) the entire receipts derived from the leasing of available lands; and (b) funds appropriated to this fund by the Legislature pursuant to section 220.

Expenditures from this fund may be made for salaries and other administrative expenses but not for structures and other permanent improvements.

The administration account is subject to the following conditions: (a) the Department is required to submit its budget to the Governor, as other departments, and upon his approval it is included within his budget which is submitted to the legislature for review; (b) upon review by the Legislature, the amount appropriated shall be available for expenditure and if no action is taken by the legislature, the amount of $200,000 per biennium is available to the Department; (c) any amount in this fund which is in excess of the appropriated amount is transferred to the Hawaiian home-development fund; and (d) the money in the administration account must be expended in accordance with state laws, rules, regulations and practices.

In construing the provisions of the administration account, the Attorney General held: (1) that section 213 authorizes the legislature to appropriate more than the amount specified in that section since the amount appearing in that section is directory when considering what the Legislature may appropriate; and (2) that such amount, however, is mandatory when the legislature does not appropriate anything (Opinion No. 1659 of January 13, 1943).

The Department is authorized to invest and reinvest any of the moneys in the loan fund in such bonds and securities as are authorized by state law for the investment of state sinking funds. Any interest or other earnings from such investments are to be deposited within the Hawaiian home-operating fund (s. 225, HHCA, 1920). Thus, the Attorney General held that the Commission may invest its money in United States interest bearing obligations since such securities are authorized by statute (Letter Opinion of June 14, 1944; RVL:GG; 3896:25).

The Act also authorizes the Legislature: (1) to appropriate to each of the funds such sums as it deems necessary; and (2) to issue bonds for the Department for revenue producing improvements which may be repaid by the Department from its operating fund (s. 220, HHCA, 1920).

Chapter II

THE QUESTION OF CONSTITUTIONALITY

The question of the constitutionality of the Hawaiian Homes Commission Act has been discussed often but has not been tested in the courts. There is no way that the question of constitutionality of the Act may be finally laid to rest except by a ruling of the Supreme Court of the United States.

Perhaps the most thorough consideration of the constitutional problem occurred in Congress in 1920, at the time that the Act was adopted, and in the Hawaii State Constitutional Convention in 1950, at the time that the convention was considering including language in the Constitution of the State which incorporated the Act into the State constitution. An examination of the presentations made before the congressional committees and the constitutional convention as reported in the reports of those bodies will give as clear a picture of the different aspects of the constitutionality question as may be obtained.

CONSIDERATION BY CONGRESS

Several presentations made to the Senate and House Committees on Territories and their reports serve to emphasize that the question of the constitutionality of the Hawaiian Homes Commission Act was considered and resolved by the Congress in the affirmative.

THE ATTORNEY GENERAL OF THE TERRITORY

The first time that the concepts embodied in the Act were held to be constitutional by an official of the territorial government was when the then Attorney General, Harry Irwin, appearing before the congressional committees which were considering the Hawaiian Homes Commission bill, testified as follows:

> . . . I come now to the proposition which I believe to be one which merits the careful consideration of the Committee and which I believe constitutes a sound and the only basis upon which legislation of this kind can be enacted. The proposition briefly stated, is that the Federal Government in the exercise of its plenary powers over the Territory of Hawaii, should by apt legislation set apart for the exclusive use of members of the Hawaiian race, certain portions of the public domain in Hawaii for the purpose of rehabilitating the race and preventing its ultimate extinction. It has been suggested by some and emphatically stated by others, that legislation of this kind may not be constitutionally enacted for the reason . . .

that it would be class legislation, and therefore in violation of the Constitution of the United States. No particular article of the Constitution has been suggested as being prohibitive of this legislation, nor do I know of any such prohibitive provision in the Constitution.

The only provisions of the Constitution of the United States which could, by any construction, affect legislation of this kind, are section 2 of article 4 and section 1 of the fourteenth amendment. These sections are usually grouped in textbooks under the title "Privileges and immunities and class legislation."

[Privileges and Immunities]

Section 2 of article 4 of the Constitution provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." This provision, however, has no application to legislation by Congress affecting the Territories.

"The guaranty contained in the Constitution as originally adopted protects only those persons who are citizens of one of the States in the Union. Thus, it does not apply to aliens or to citizens of the United States resident in an organized Territory of the United States." (12 C.J. 1109)

This question was considered by the Supreme Court of California in Estate of Johnson (139 Calif. 532) . . . . In support of the text as quoted from 12 C.J. 1109, supra, this case directly holds that citizens of the United States, that is, residents of the Territories, organized and unorganized, who are not citizens of any State, are not protected by this clause of the Constitution.

"This privilege does not affect the power of Congress to give the residents of Territories privileges and immunities not accorded to non-residents thereof." (12 C.J. 1109)

In a case entitled "Coal and Improvement Co. v. McBride" (3 Ind. Territory 224) it was . . . claimed that the law in question was beyond the power of Congress as being in violation of section 2 of article 4 of the Constitution. The court, in discussing this question, said . . . that "unless a law deprives the inhabitants of a Territory of some property or of vested rights, or of personal liberty, without due process of law, Congress has plenary power of legislation over them."

[Class Legislation]

That portion of section 1 of the fourteenth amendment which is germane to the subject under consideration reads as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

"This section of the Constitution operates only as a protection against State action." (12 C.J. 1111; Robinson v. Fishback 175 Ind. 132;

Mulligan v. United States, 120 Fed. 98; Farrell v. United States, 110 Fed. 942.)

[Conclusion]

After a consideration of the various principles involved, I am of the opinion that nothing in the Constitution of the United States prohibits Congress from enacting the legislation recommended by Senate Concurrent Resolution No. 2.[4]

THE SOLICITOR OF THE DEPARTMENT OF INTERIOR

The solicitor of the Department of the Interior in a written opinion submitted to the House Committee on Territories maintained that the Hawaiian Homes Commission bill was clearly constitutional. He stated:

> Would an act of Congress setting apart a limited area of the public lands of the Territory of Hawaii for lease to and occupation by native Hawaiians be unconstitutional? It would not. There are numerous congressional precedents for such action. The act of Congress approved February 8, 1887, as amended by the act of February 28, 1891 (26 Stat. 794) authorizes public lands which have been set apart as Indian reservations by order of the President to be surveyed and 80 acres of land therein to be allotted to each Indian located upon the reservation, or where the lands are valuable for grazing to be allotted in areas of 160 acres. Another section of the same act authorizes any Indian entitled to allotment to make settlement upon any public lands of the United States not otherwise appropriated and to have same allotted to them.
>
> Resolution No. 20 passed by the House of Representatives December 10, 1919, and by the Senate February 5, 1920, gives soldiers of the late war a preference right over all other citizens to enter public lands of the United States when same shall be open to disposition. H. R. 1153 proposes to set apart a large area of valuable public lands in Imperial Valley, California, for disposition to soldiers. Many instances might be cited where Congress has conferred special privileges or advantages upon classes of individuals in connection with the disposition or use of public land. Another line of acts of Congress are numerous laws setting apart areas of public lands for water supply or park purposes of cities, counties, and towns.[5]

CONGRESSIONAL COMMITTEE REPORT

The House Committee on Territories commented on the constitutionality of the legislation that it was recommending

for passage by stating:

> In the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for native Hawaiians only. The privileges and immunity clause of the Constitution, and the due process and equal protection clauses of the 14th amendment thereto, are prohibitions having reference to State action only, but even without this defense the legislation is based upon a reasonable and not an arbitrary classification and is thus not unconstitutional class legislation. Further there are numerous congressional procedents for such legislation in previous enactments granting Indians and soldiers and sailors special privileges in obtaining and using the public lands. Your committee's opinion is further substantiated by the brief of the Attorney General of Hawaii (see Hearings, pp. 162-164) and the written opinion of the solicitor of the Department of the Interior (see Hearings, pp. 130-131).[6]

CONSIDERATION BY THE CONSTITUTIONAL CONVENTION

The Hawaii State Constitutional Convention convened on April 4. 1950 as provided for by Act 334, L.1949. At the time that the convention was meeting, the 81st Congress was considering H.R. 49--a statehood enabling bill for Hawaii. This bill contained as one of its provisions, the following:

> That, as a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, is adopted as a law of said State, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, that (1) section 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the original constitution or in the manner required for ordinary State legislation, but the Hawaiian home-loan fund and the Hawaiian home-development fund shall not be reduced or impaired, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act shall not be increased, except with the consent of the United States; (2) that any amendment to increase benefits to lessees of Hawaiian home lands may be made in the original constitution or in the manner required for ordinary state legislation but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from Hawaiian home lands, shall be available to said State for use in accordance with the terms of said Act.

The convention, thus, had what it believed to be an implied mandate from the provisions of the bill to include provisions in the Constitution which would assure a protected future for the Hawaiian Homes program. It was the consensus of the convention that any proposed constitution not including such provisions would be unacceptable to Congress.

The final language of Article XI of the Constitution, the report to the Committee of the Whole, and the comments of the delegates while discussing the committee proposal, shed some further light on varied aspects of the constitutionality question.

ARTICLE XI OF THE CONSTITUTION

Article XI of the State Constitution was adopted by the convention substantially as proposed by the Committee on the Hawaiian Homes Act. It contains two sections: the first section adopts the provisions of the Hawaiian Homes Commission Act as a law of the State subject to amendment or repeal in the manner provided by the enabling act; and the second section provides that the State and its people agree to enter into a compact with the United States, the provisions of which shall be stipulated by the enabling act, and further that the State and its people agree to faithfully carry out the spirit of the Hawaiian Homes Commission Act. The Article reads as follows:

> SECTION 1. Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature, provided, that, if and to the extent that the United States shall so require, said law shall be subject to amendment or repeal only with the consent of the United States and in no other manner, provided, further, that, if the United States shall have been provided or shall provide that particular provisions or types of provisions of said Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of said Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law.
>
> SECTION 2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that Section 1 hereof be included in this constitution in whole or in part, it being intended that the Act or Acts of the Congress pertaining

thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

THE COMMITTEE ON THE HAWAIIAN HOMES ACT

The Committee on the Hawaiian Homes Act which was charged with the responsibility of conducting hearings on the Act, determining the relationship of the Act to the Constitution, and of recommending the provisions to be included in the Constitution made its position on the constitutionality of the Act abundantly clear in its report. This report which was unanimously recommended by the committee chaired by Flora K. Hayes included comments on the effectiveness of the Act in achieving its goals. Its Standing Committee Report No. 33 stated in part:

> . . . The Hawaiian Homes Commission Act, 1920, as amended, is presently part of the basic law of the Territory of Hawaii, on the same basis as the Hawaiian Organic Act. It is an act of Congress, and can only be amended or repealed by Congress. If Hawaii were to remain a Territory, the Hawaiian Homes Commission Act would remain in force. If Hawaii were to become a State without any mention being made of the Hawaiian Homes Commission Act or the Hawaiian Homes lands in the State Constitution, or in any enabling act passed by Congress, there would be an extremely ambiguous legal situation leading to endless confusion. We could no more adopt a Constitution from which all reference to the Hawaiian Homes Commission Act was excluded, than we could adopt a Constitution from which all reference to the public debt of the Territory of Hawaii was excluded. During some 30 years of operations under this Act, very extensive rights, duties, privileges, immunities, powers and disabilities have arisen by way of leases, loans, contracts and various other legal relationships.
>
> . . . It is therefore nonsense to propose, as some of the petitions referred to this Committee have proposed, that this Convention exclude from the proposed State Constitution all reference to the Hawaiian Homes Commission Act, 1920, as amended. Something must be said and done about the Hawaiian Homes program in the transition from a Territory to a State.
>
> In recognition of this problem, the Hawaii Statehood Commission recommended, and H. R. 49, now pending in the United States Senate, now contains a provision that any convention formed under the provisions of H. R. 49 to draft a State Constitution:
>
> . . . shall provide in said constitution:

. . . . . .

. . . That, as a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, is adopted as a law of said State, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the original constitution or in the manner required for ordinary State legislation, but the Hawaiian home-loan fund and the Hawaiian home-development fund shall not be reduced or impaired, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act shall not be increased, except with the consent of the United States; (2) that any amend- [sic] amendment to increase the benefits to lessees of Hawaiian home lands may be made in the original constitution or in the manner required for ordinary State legislation but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from Hawaiian home lands, shall be available to said State for use in accordance with the terms of said Act.

H. R. 49 passed the United States House of Representatives with the quoted language included. According to recent news reports from Washington, D. C., the Senate Committee on Interior and Insular Affairs has already considered amendments to H. R. 49 and has made certain amendments, none of which change or affect the quoted language. There is every reason to believe, therefore, that H. R. 49 as finally enacted will contain this requirement. If for any reason H. R. 49 should fail to be enacted into law, we have before us nevertheless the clear intent of Congress that any constitution for the proposed State of Hawaii shall provide for the continuation of the Hawaiian Homes program, and even the exact language which would be acceptable to the Congress in accomplishing this purpose.

* * * * *

Your Committee's task, therefore, has been clear cut from the beginning. It has not even been a legitimate matter for debate whether the Hawaiian Homes Commission Act should be continued in force. Congress required that this be done as a condition of achieving statehood, and has supplied the outline of the language it will accept in the accomplishment of this requirement.

Nevertheless, in view of the offering of Res. Nos. 19 and 21 asking Congress to permit the liquidation of the Hawaiian Homes program, and of the receipt of several petitions obviously intending the same result if somewhat inartistically worded, your Committee did go into the history, purpose and philosophy of the Hawaiian Homes project in order to determine the desirability of its continuance on the remote possibility that Congress might accept a State Constitution which provided for the termination of

of the Hawaiian Homes project.

The Hawaiian Homes program was conceived in Hawaii and officially proposed to the United States Congress by Senate Concurrent Res. No. 2 of the Regular Session, 1919, Tenth Legislature, Territory of Hawaii . . . . As a consequence of the agitation for this program, the Congress finally enacted the Hawaiian Homes Commission Act, 1920.

. . . Until very recently, there has never been any suggestion that the Hawaiian Homes program should be discontinued. Then the use of certain Hawaiian Homes Lands at Waimea, Hawaii, came up for discussion, and in the ensuing argument, some few persons brought into the question the very existence of the Hawaiian Homes Commission Act, 1920. The arguments raised against the Act have been as follows:

1. It is unconstitutional.
2. It is discriminatory.
3. The Hawaiian Homes program is a failure.
4. It is time to liquidate the Hawaiian Homes program.
5. A majority of the people of Hawaii are opposed to the Act.

The question of the constitutionality of the Act was considered at the time of its original introduction. The attorney general of Hawaii, the solicitor of the Department of Interior, and the Congress were satisfied that the Act is constitutional. These opinions are as valid today as they were then.

The Act is not discriminatory. It is a very progressive piece of legislation designed to aid an aboriginal people survive the sudden impact of a new and highly complex civilization on their lives. It was passed to meet a very real problem and the fact that this problem is not apparent today is the best evidence that the Act is succeeding in its purpose. In some of the Polynesian areas, Western governments that took control enacted laws that no land could be alienated, as a measure of protecting the native peoples. In Hawaii, the effect of the Hawaiian Homes Commission Act is to preserve only a very small part (approximately one per cent) of the domain for the Hawaiians, and to permit the ready transfer of other lands. It would be more discriminatory to repeal the Act.

Those who claim the Hawaiian Homes program is a failure are uninformed. The growth of the program from its inception to the present day is a matter of public record and it is a sufficient answer to this claim.

So long as there are eligible applicants endeavoring to obtain Hawaiian Homes lands, there is every reason for continuing the program. When no lands are left and when no applicants remain unsatisfied, then it will be time to raise the question of whether the Hawaiians have been fully rehabilitated.

The hearings, petitions and communications before this Committee have demonstrated beyond any doubt that a majority of the people of Hawaii favor the inclusion of the Hawaiian Homes Commission Act, 1920, in the proposed State Constitution. [7]

The committee report and its proposal, as amended, was adopted by the Committee of the Whole by voice vote on June 8, 1950.

CIVIL RIGHTS AND THE HAWAIIAN HOMES ARTICLE

The question arose during the debate on the Bill of Rights as to whether there was a conflict between the civil rights provisions proposed for inclusion in the Constitution and the Hawaiian Homes Commission Act provision. The discussion proceeded as follows:

> A. TRASK: Point of information. Is Section 6 [of Committee Proposal No. 4 of the Committee on Bill of Rights as reported in Standing Committee Report No. 24] limited just to the first paragraph. . . or does it include also consideration of the second paragraph which reads as follows: "No person shall be denied the enjoyment of his civil rights nor be discriminated against in the exercise of his civil rights because of religious principles, race, sex, color, ancestry or national origin"?
>
> CHAIRMAN: The question is to adopt the section in its entirety, including the second paragraph.
>
> A. TRASK: Well, I'd like to direct the attention of the Convention to the second section and ask of the chairman whether or not he considered this second section with reference to the Hawaiian Homes Commission Act? Now in the Hawaiian Homes Commission Act committee report which it submitted, and the proposals with respect to its inclusion in the Constitution, there is the opening provision namely: "All provisions in this constitution notwithstanding." Now, the Bill of Rights Committee has extended to the Madam Chairman of the Hawaiian Homes Commission Act Committee and to other members of our committee that with that opening sentence in the Hawaiian Homes Commission Act proposal and its inclusion in the Constitution that this section . . . will not in any way interfere, and that such statement be included in the report of this Committee of the Whole to indicate that this Section 2 will not interfere with the provision of the Hawaiian Homes Commission Act. Could the chairman answer that?
>
> MIZUHA: The Committee on the Bill of Rights had before it the question as to whether or not the anti-discrimination clause as written herein would conflict with the general provision for the record incorporation of the Hawaiian Homes Commission Act in the Constitution. After due consideration, it was felt that the provisions in the Hawaiian Homes Commission section as read by the delegate from the fifth district would take care of the situation, and I believe if the Constitution as adopted contains that section as read by the delegate of the fifth district with reference to the Hawaiian Homes Commission, then it will serve as an exception to this Section 6.
>
> ASHFORD: Point of information. May I ask the delegate from the

fifth district whether he regards the Hawaiian Homes Commission Act as a racial discrimination in the granting of civil rights?

A. TRASK: I certainly do not--

CHAIRMAN: Question's been answered.

A. TRASK: --but in drafting such a basic law as this--

CHAIRMAN: This is an explanation to the answer?

A. TRASK: --the delegate from Molokai smilingly acknowledges, that we have to make . . . the wording here as precise and exacting as possible, and elastic as possible, and I want to say to the chairman of the Civil Rights Committee who answered the inquiry that Judge Heen, delegate from the fourth district, has concurred in his conclusion and that we request that the same be included in the report of this committee. Will that be done, Mr. Mizuha?

MIZUHA: I believe that would be a proper subject for a motion on the part of the delegate from the fifth district to be decided by this Committee of the Whole.

TAVARES: It seems to me that if we adopt or go on the premise, which I think we have to go on until the courts rule otherwise, that the Hawaiian Homes Commission Act is constitutional; it is an act of Congress which has already given rights to a certain group of our people; if that act is valid, and as I say we must presume it until it's declared unconstitutional by the courts, until and unless it is so declared, then the people of this territory have no civil rights to share . . . in the Hawaiian Homes lands, and therefore this civil rights provision will not apply at all, as I read it.

Now if the act is unconstitutional then somebody ought to take it into court, and do that, and it'll take care of itself automatically. I feel therefore that actually in adopting this Bill of Rights . . . section, we will not be infringing on the rights of any persons entitled to benefits under the Hawaiian Homes Commission Act.

A. TRASK: I concur with the expression of the delegate from the fourth district, and at this time move that this expression may heretofore be incorporated in the report of this Committee of the Whole.

DELEGATE: Second the motion.

BRYAN: I'd like to point out that this particular paragraph was reworded to get to the point that the delegate from the fourth just made. "No person shall be denied the enjoyment of his civil rights," that means civil rights that would go to him under any other circumstances. Therefore, if enjoyment of the rights guaranteed by the Hawaiian Homes Commission Act do not apply to certain individuals, this paragraph would not apply to them.[8]

It is apparent from the above quotes that the delegates did

adopt a motion which expressed their feeling that the Bill of Rights section on discrimination was not applicable to the Hawaiian Homes section and that such expression be incorporated as part of the report of the Committee of the Whole.

INDIAN LANDS AND THEIR CONTROL BY THE UNITED STATES

During the discussion of the proposed Hawaiian Homes constitutional provision, two delegates found it appropriate to comment on the control of the Indian lands by the United States and to compare this situation to the Hawaiian home lands situation. Delegate Ashford, noting the differences, spoke as follows:

> . . . The Indian lands referred to in the various constitutions of the newly created states and compacts with the United States are an entirely different basis from the Hawaiian Homes Commission lands. When we became a part of the United States, the United States had no public lands here except those specifically designated for defense and so forth. The public lands were ceded to the United States and accepted under the Newlands Resolutions subject to a trust; that trust was recognized when we became an organized Territory. The lands were put under our administration by the Organic Act. They remained our lands in the control of the United States pending the time we were to be admitted as a state
>
> Now, the Indian lands are upon a different basis entirely. Those were lands not for specific Indians, they were lands set aside either by treaty with the Indians or by an act of Congress out of the public unappropriated lands of the United States--none of which exists in Hawaii or have existed in Hawaii--and always under the control of the United States under the terms of the Constitution and under their absolute title. The terms of the Constitution of the United States provide for the regulation of commerce with the Indian tribes. Those lands were set aside from the control of the state, retained in the United States, and subject to the control of the United States; therefore, there was no infringement of the sovereignty of the state. In this case, however, the trustee of our lands, in returning them to us, is attempting to attach to them terms of trust as though it were the full order. That distinguishes these lands from the lands set aside in the various new states for Indian reservations . . . .[9]

Delegate Tavares felt the distinctions made by Delegate Ashford were not valid.

> . . . I agree with the statement that ordinarily since the lands are trust lands, Congress would not be reasonable in putting a string on it when it gives it back to us. Unfortunately, we, the beneficiaries, have agreed to that change of the Hawaiian Homes Commission Act through our legislature. Not once, but many, many times. And in that respect

therefore, we have the situation of the beneficiary having consented to the trustee changing the terms of the trust and I think that the argument [by Delegate Ashford] , therefore, is not sound.10

CLASSIFICATION BY RACE AND THE CONSTITUTIONALITY OF THE COMPACT

Delegate Ashford raised some of the most serious questions concerning the advisability and constitutionality of incorporating the Hawaiian Homes Commission Act into the State Constitution. The following discussion occurred during the course of the debate on the Hawaiian Homes Article:

ASHFORD: A point of personal privilege. The delegate from the fifth district has said the opponents of writing this law into the Constitution do so on the ground that the lands aren't available to all the people. That is not my position at all. My position is twofold. First, that it writes into our Constitution an adoption of the principle that classification by the accident of race is appropriate, which seems to me the most dangerous principle we could possibly accept here. And, second, that the lands granted by the Republic of Hawaii and accepted by the United States, being ceded in trust cannot have trust strings tied to them when they are returned . . . .

SAKAKIHARA: I would like to ask the delegate from Molokai a question. She has raised a twofold question here giving her reasons why she feels that this should not be written into the basic law. Does the delegate from Molokai feel that on those grounds that this proposal will be unconstitutional? In your opinion?

ASHFORD: . . . I think that the requirement by H. R. 49 of entering into a compact with the United States is absolutely invalid. This is land and this is a subject matter over which the United States, if we were a state, would have no control, and in requiring us to enter into such a compact, they diminish our sovereign powers. They, therefore, infringe upon that well settled interpretation of the provisions of the Constitution that new states shall be admitted upon equal terms with the old.

Now, I'll just read you some certain language from the Supreme Court of the United States which in its essence has been repeated often.

> When a new state is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original states, and such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the Union which would not be valid and effectual if the subject of Congressional legislation after submission. (Coyle v. Smith, 221 U. S. 559)11

NECESSITY FOR INCORPORATION AND COMPACT SECTIONS

Some serious questions were raised concerning the need to include not one but two protective sections in the Hawaii State Constitution.

KELLERMAN: Am I correct in my interpretation of these two sections, that Section 1 writes into the Constitution the Hawaiian Homes Commission Act as a law and that Section 2 makes a compact with the United States to write it into the Constitution as a law? Is that correct? . . .

HAYES: It's my understanding that that is correct, compact with United States. Otherwise, we are making a treaty with the United States. The word "compact" would be a treaty.

KELLERMAN: May I ask a second question then? Why is it necessary to adopt one section writing into the Constitution the Hawaiian Homes Commission Act as a law and . . . a second section agreeing with the United States government under compact to write it in as a law? It seems to me that we're doing the same thing twice and it would have the following consequences. Should there eventually be a change in the compact agreement, you still have the Constitution to deal with and certain provisions which are written into the Constitution which are not subject to amendment. You therefore have to amend the Constitution in addition to altering your compact agreement . . . . Is it the understanding of the Convention that we are adopting the act as a law in the Constitution, which then would require an amendment of the Constitution to change it? . . . In the second place, we are agreeing with the Congress to enter into a compact to adopt it as a law, and that compact could be changed with the consent of the United States. Now it seems to me we're getting unnecessarily involved in having it in the Constitution in one section and subject to the compact in the second section. I'd like to have that explained . . . why that complicated procedure must be followed. It seems to be totally unnecessary and restricting any possible action that may be made, in some instances, even to amend the compact, because it's in the Constitution . . . .

ANTHONY: The purpose of the proposal is twofold. One, the first section will embody the act in the Constitution. Standing alone, if that were just in the Constitution and nothing more, then by a subsequent action of subsequent conventions that section could be repealed. As I understand the draftsman, in order to remove that difficulty they have gone one step further and said, not only shall it be written into the Constitution, but there shall be a compact with the United States. Now, what Delegate Kellerman is concerned about is the necessity of the two sections. I as a lawyer don't think that two sections are necessary; the compact would be sufficient. But the purpose in having it in two sections, as I understand it, is, one, to put it in the Constitution, and that is not sufficient because a subsequent convention might change it. So they have added a second section which would require the entry of a compact between the United States and the State providing that it could not be changed without the consent of the Congress.

TAVARES: I think one further explanation will clear this up. If you will read Section 1 carefully, it has this proviso: "Provided further that if the United States shall have provided or shall provide that particular provisions or types of provisions of said act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended." That takes all the pilikia out of the situation, because if Congress in the future consents to have us amend that act, then we can amend it and we don't need to amend our Constitution.

HAYES: I was just going to say that that section complies with the apparent will of Congress and continues the recognition by the people of Hawaii of the justice of the original enactment of the Hawaiian Homes Commission Act as of 1920. That is my interpretation from the attorney general's office.

KELLERMAN: It seems to me that this first section is unnecessary and it may get us in trouble. It looks to me like an open-end agreement that even after we have become a state and have entered into a compact as a condition precedent to becoming as a state, that we are agreeing that we may still abide by and consent to, in advance, provisions that subsequent legislation of Congress may request us to abide by under the terms of that compact. As I see it, that would be clearly unconstitutional and not what we intend to do. As far as I can see we are getting in trouble in the first section and this matter would be entirely cleared up if the provisions of the first section insofar as are required by Act 49, were incorporated in the second section, which is the compact section. For that reason when the vote is taken, I shall vote against Section 1, although I am not opposed to the compact on the subject matter involved.[12]

CONCLUDING NOTE

The constitutionality of the Hawaiian Homes Commission Act has not been challenged in either the federal or state courts. The expressed opinion of those responsible for the original enactment of the Hawaiian Homes Commission Act and of the majority of the delegates to the state Constitutional Convention who spoke on aspects of the problem is that the Hawaiian Homes program is constitutional.

Chapter III

THE COMPACT BETWEEN HAWAII AND THE UNITED STATES

The United States as a condition of admission of Hawaii into the Union required that Hawaii enter into a compact with the United States with respect to the Hawaiian homes program. A compact is generally viewed as a binding agreement between two governments which may only be abrogated or modified by mutual consent of the parties entering into the compact. The question which necessarily arises when the federal government requires the acceptance of a compact by a wholly dependent and subordinate territory as a condition to be met before granting statehood, is how that compact applies after the territory becomes a state. The question may also be phrased as: whether or not the new state has been admitted with the same rights and responsibilities as other states.

THE ADMISSION ACT AND THE STATE CONSTITUTION

Section 4 of the Admission Act (Act of March 18, 1959; 73 Stat. 4, Public Law 86-3; amended July 12, 1960, 74 Stat. 422 and 423, Public Law 86-624) required the State of Hawaii to adopt the Hawaiian Homes Commission Act of 1920 as a provision of its constitution:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of the State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, that (1) section 202, 213, 219, 220, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

Section 7, subsection (b), referred to above provided for the electors to decide whether they desired statehood, whether they accepted the boundaries for the State as specified in the Admission

Act, and whether or not they consented fully to the terms, conditions and reservations relating to grants of lands and other property made in the Admission Act. That section provided among other things that if the majority of the voters ratified the propositions, Article XI of the State Constitution would be deemed to include the provisions of section 4 of the Admission Act.

The Admission Act became law on March 18, 1959. Three months later, on June 27, the Hawaii electors approved the three propositions and section XI of the Constitution was automatically amended to include section 4 of the Admission Act.

THE LEGALITY OF THE COMPACT

In a discussion concerning the conditions governing the admission of new states, Corpus Juris Secundum has, on the basis of Coyle v. Smith, 221 U. S. 559, 31 S. Ct. 688, 55 L. Ed. 853 (1911), divided the subject into three classes: (1) provisions fulfilled by admission of the state; (2) compacts or legislation intended to operate in the future, which are within the conceded powers of Congress over the subject; and (3) compacts or legislation which restrict the powers of a new state over matters which otherwise would be exclusively within the sphere of state power. Corpus Juris Secundum comments as follows with respect to each class:[13]

> (1) [Provisions Fulfilled by Admission of the State.] . . . congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval; thus, congress may require, as a condition to its consent, that any provision which it thinks proper shall be embodied in the organic law of the proposed state at the time of admission, and, until altered or repealed by proper state action after admission, such a condition is to be taken as a part of the fundamental law of the state.
>
> (2) [Compacts or Legislation Intended to Operate in the Future and Within Conceded Powers of Congress over the Subject.] . . . the provisions, being only those which it is already within the power of congress to enact, derive their force from the existing powers of congress under other provisions of the federal Constitution, rather than from any compact or consent by the state, and are valid as, in so far as they are proper federal legislation, regardless of the form in which they are enacted.
>
> (3) [Compacts or Legislation Intended to Operate in the Future but which Restrict the Powers of the New State in Matters Otherwise Exclusively within the Sphere of State Power.] . . . there is no power in congress to prescribe any such conditions, operating to limit in the future the legislative power of a new state over matters in their nature confided exclusively to the states as a part of their sovereign powers; their equality with the older states cannot be impaired in such matters by the provisions of enabling acts or conditions otherwise imposed by congress on, and at the time of, admission.

The legality of the compact governing the Hawaiian homes program appears to rest on whether the matter is one that is within the scope of the conceded powers of Congress or whether the matter is exclusively within the sphere of state power. Perhaps a review of Coyle v. Smith, supra, the critical U. S. Supreme Court case governing conditions attached to the admission of new states to the Union; of the Newlands Resolution, providing for the annexation of Hawaii; and of the power of the U. S. Congress to dispose of public lands will shed some light on the question.

COYLE v. SMITH

During the Constitutional Convention, some of the delegates felt that a compact between the state and federal government would not be binding. For their authority they cited the case of Coyle v. Smith, 221 U. S. 559, 31 S. Ct. 688, 55 L. Ed. 853 (1911).

The facts in this case, briefly, were as follows. Oklahoma in 1910 provided for moving its state capital from Guthrie to Oklahoma City. This state Act was held by a lower court to be void since its provisions contravened those of the Act of Congress (Act of June 16, 1902; 34 Stat. 267, c. 3335) authorizing the admission of Oklahoma "into the Union on an equal footing with the original states." One section of the federal Act specified that the state capital was to be located at Guthrie until 1913 after which year the Oklahoma electors were to be able to select the site for their capital. The Act mandated "that the constitutional convention provided herein shall, by ordinance irrevocable, accept the terms and conditions of this act."

The Oklahoma constitution did not contain any provisions relating to the location of the state capital, but the constitutional convention framed and adopted a separate ordinance which provided for the irrevocable acceptance of the terms and conditions of the enabling Act. The constitution and the ordinance were ratified by the people of Oklahoma.

The court, in its decision, stated:

> . . . The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the State after its admission, which overrides any subsequent state legislation repugnant thereto. (p. 565)
>
> [Power to Locate State Capital Essentially a State Power.] The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly State powers.

That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? (p. 565)

[Argument Favoring Right of Congress to Impose a Limitation.] The argument is, that while Congress may not deprive a State of any power which it possesses, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union, and the constitutional duty of guaranteeing to "every State in this Union a republican form of government." The position of counsel for the appellants is substantially this: That the power of Congress to admit new States and determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would not otherwise possess, and, therefore, not admitted upon "an equal footing with the original States." (p. 565-566)

[Power of Congress in Admitting a New State.] The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that "new States may be admitted by Congress into this Union." (p. 566)

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit States." (p. 566)

The definition of "a State" is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the States of Vermont and Kentucky, one of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the State is admitted "as a new and entire member of the United States of America." 1 Stat. 189, 191. Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission of 1796 of Tennessee, as the third new State, it being declared to be one of the United States of America "on equal footing with the original States in all respects whatsoever," phraseology which has been since substantially followed in admission acts, concluding with the Oklahoma act, which declares Oklahoma shall be admitted "on equal footing with the original States." (pp. 566-567)

[Nature of the Union into Which the New State is Admitted.] The power is to admit "new States into this Union."

"This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. (p. 567)

[The Republican Form of Government Guarantee.] The argument that Congress derives from the duty of "guaranteeing to each State in this Union a republican form of government," power to impose restrictions upon new States which deprives it of equality with other members of the Union, has no merit. It may imply the duty of such new State to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican,--Minor v. Happersett, 21 Wall, 162, 174, 175,--but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union. (pp. 567-568)

[Prior Decisions of the Court.] We come now to the questions as to whether there is anything in the decisions of this court which sanctions the claim that Congress may by imposition of conditions in an enabling act deprive a new State of any of those attributes essential to its equality in dignity and power with other States. In considering the decisions of this court bearing upon the question, we must distinguish first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect to matters which would otherwise be exclusively within the sphere of a state power. (p. 568)

So far as this court has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new States after admission, there is to be found no sanction for the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed. (p. 570)

[Rule of the Prior Cases.] The plain deduction from this case (Pollard's Lessee v. Hagan, 3 How. 212) is that when a new State is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which a new State came into the Union which would not be valid and effectual if the

subject of congressional legislation after admission. (p. 573)

[Distinction between Matters within the Power of Congress to Regulate and Matters not within the Power of Congress to Regulate.] It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation that would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Williamette Bridge Co. v. Hatch, 125 U. S. 1, 9; Pollard's Lessee v. Hagan, supra. (p. 574)

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the state, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. If power to impose such a restriction upon the general and undelegated power of a State be conceded as implied from the power to admit a new State, where is the line to be drawn against restrictions imposed upon new States . . . . (p. 574)

[Holding the Court.] Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot. (p. 579)

Matters within the Power of Congress to Regulate. A careful reading of Coyle v. Smith, supra, will indicate that this case stands for the proposition that if Congress does not have the power to impose limitations or conditions upon the admission of a new State other than from its power to admit new States, then an imposition such as found in that case cannot be sustained. The case also holds that if Congress has the power over the subject matter, Congress may impose limitations because the State's power would not then be affected. In the words of the court, at page 574:

It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as . . . regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation that would derive its force not from any agreement or compact with the

> proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Williamette Bridge Co. v. Hatch, 125 U. S. 1, 9; Pollard's Lessee v. Hagan, supra.

The above paragraph quoted from Coyle v. Smith, supra, clearly states that the legislative power of Congress extends to "regulations touching the sole care and disposition of the public lands or reservations therein." Such legislation would derive their force from Congress' power over the subject matter rather than from a compact or agreement or from the acceptance of the conditions by a proposed new State. Thus, it becomes imperative that the subject matter being regulated by the compact be critically examined.

THE SUBJECT MATTER OF THE COMPACT

Section 4 of the Admission Act, supra, clearly states that the subject matter of the compact is the management and disposition of the Hawaiian home lands:

> Section 4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of the State, as provided in section 7, subsection (b) of this Act . . . .

If the subject matter of the compact is the management and disposition of the Hawaiian home lands, it becomes important to determine whether or not the United States had title to the lands designated as Hawaiian home lands prior to Hawaii attaining statehood, for if it did, such lands would then be considered as public lands of the United States.

THE NEWLANDS RESOLUTION

The Newlands Resolution (Resolution No. 55 of July 7, 1898; 30 Stat. 750; 2 Supp. R. S. 895), which provided for the annexation of Hawaii, contained the following language as it relates to the public lands:

> Whereas the Government of the Republic of Hawaii, having in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military

equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; Therefore

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America . . . . (First underlining for emphasis only)

Thus, it can be seen that the title in fee to the public lands of Hawaii was transferred to the United States of America upon the passage of the Newlands Resolution. It is also clear that with the passage of the Newlands Resolution, the public lands of the Republic became a part of the public lands of the United States.

POWER OF CONGRESS TO MANAGE THE PUBLIC LANDS

In discussing the power of the United States to manage its public lands, 73 Corpus Juris Secundum, Public Lands, section 3, pages 649-651, states:

As owner of the public lands, the United States has the same right and dominion over them that any other owner would have, and may protect them from depredation.

Congress is vested by Article IV section 3 clause 2 of the federal Constitution with the power to control and make all needful rules and regulations with respect to the public domain. Congress has both legislative and proprietary powers with respect to the public domain. It may prescribe rules with respect to the use . . . and occupancy of the public domain precisely as an individual deals with and controls his land. The power over the public domain intrusted to Congress by the Constitution is exclusive, plenary, and without limitations. It is for Congress to determine how the trust shall be administered and not for the courts. The courts or executive agencies may not proceed contrary to an act of Congress in this congressional area of national power . . . . (underlining for emphasis)

The states have power to control and regulate public lands belonging to them, although, where such state lands have been granted to the states by the federal government, the regulations must be consistent with the terms on which the lands were granted.

POWER OF CONGRESS TO DISPOSE OF PUBLIC LANDS

In discussing the power of Congress to dispose of public lands, 73 Corpus Juris Secundum, Public Lands, section 24, pages 675-676 states:

> Congress is vested by the Constitution with the power of disposition of public lands. The power is without limitation and congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any part of it, and to designate the persons by whom, and to whom, the transfer shall be made. . . .
>
> No state legislature can interfere with the right of the United States to dispose of public lands or embarrass its exercise. In order to prevent the possibility of any interference, the compacts which new states have been admitted into the Union usually make express recognition of the right of congress to control and dispose of public lands, and provide that state interference with the primary disposal of the soil by the United States shall never be made. The states cannot dispose of land of the United States which has not been granted to them. When congress has given a territory the power to deal with public lands conveyances made pursuant to this power are not conveyances of the United States by territorial agents, but are conveyances of, and by, the territory in its own right.

POWER OF CONGRESS TO IMPOSE AND ENFORCE TRUST PROVISIONS

The power of Congress to impose and enforce trust provisions when disposing of its public lands is made clear in Ervien v. United States, 251 U. S. 41 (1919). In that case, the Supreme Court of the United States prohibited the State of New Mexico from departing from the trusts, which had been imposed through the enabling act, upon the lands given to the State of New Mexico upon admission. The case involved the following pertinent facts:

(1) The Enabling Act of June 20, 1910, sec. 10, c. 310, 36 Stat. 557 provided that the public lands granted and confirmed to the State of New Mexico, their natural products and money proceeds shall be held in trust for the several objects for which the lands were granted or confirmed, and that any disposition of such lands, money or products for other objects would be deemed a breach of trust which could be enforced by the Attorney General of the United States;

(2) The state accepted the grant and confirmation of the lands

upon the conditions and limitations prescribed in sections 9 and 10 of Article 21 of the Constitution of New Mexico; and

(3) On March 8, 1915, the Legislature of the State passed an Act entitled "An act concerning the publicity and promotion of public resources and welfare" which in essence authorized the Commissioner of Public Lands to expend annually three cents on the dollar of the annual income from the sales and leases of lands for making known the resources and advantages of the state generally to homeseekers and investors.

A suit was then brought to enjoin the Commissioner of Public Lands of the State of New Mexico from expending funds, which were derived from the sale and lease of lands granted and confirmed to the State by the Act admitting New Mexico into the Union, for publicizing the advantages of the State. The Court, on pages 47-48, held:

> The case is not broad in range and does not demand much discussion. There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose. And to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same. To preclude any license of construction or liberties of interference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should "be deemed a breach of trust."
>
> . . . The phrase, however, means no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply the considerations. The careful opinion of the Circuit Court of Appeals has made it unnecessary. We approve, therefore its conclusion and affirm its decree. (See also U. S. v. Ervien, C. C. A. 8th Cir., 246 F. 277 (1917).

THE POWER TO ENTER INTO COMPACTS

There is no question that the federal government has the power to enter into compacts. Grad, Federal-State Compact: A New Experiment in Cooperative Federalism, 63 Col. L. Rev. 825, 842 (1963) states:

> The Constitution does not prohibit the federal government from entering into compacts with one or more states, and contractual arrangements between the government and one or more states, much in the nature of compacts have been upheld by the Supreme Court for more than a century, beginning with the Cumberland Road cases . . . .

CONCLUDING NOTE

From the foregoing discussion, the following points are clear:

(1) Coyle v. Smith, supra, held that Congress may not impose restrictions or conditions in the enabling act over subjects which it did not have power to regulate but that Congress may embrace in an enactment introducing a new State into the Union legislation intended as regulations touching the sole care and disposition of the public lands or reservations therein which will be upheld as legislation that would derive its force from the power of Congress to regulate public lands;

(2) The subject matter of the compact is the management and disposition of Hawaiian home lands;

(3) The Newlands Resolution transferred the fee simple title of the public lands of Hawaii from the Republic of Hawaii to the United States of America thereby making such public lands the public lands of the United States;

(4) The Constitution of the United States by Article IV, section 3, clause 2, vests in Congress the exclusive and plenary power to control and dispose of the public domain;

(5) Congress has the power to impose and enforce trust agreements which are contained in the enabling acts of new States; and

(6) Congress has the power to enter into compacts.

The foregoing points make it possible for one to argue that the provisions of the compact as contained in the Admission Act are valid limitations or conditions on the State of Hawaii which can be enforced by the federal government since the subject matter--public lands--of the compact is within the conceded exclusive and plenary power of Congress.

Chapter IV

AMENDING THE HAWAIIAN HOMES COMMISSION ACT

There are several questions which have arisen concerning the method of amending the Hawaiian Homes Commission Act. These questions, according to the Attorney General, arise because of the conflict between the wording of sections 1 and 2 of Article XI of the State Constitution and section 4 of the Admission Act. The provisions of section 4 of the Admission Act were adopted verbatim as an amendment of Article XI of the State Constitution as a result of section 7(b) of the Admission Act and the plebiscite held in Hawaii on June 27, 1959.

The conflict between the provisions of Article XI and section 4 was first raised by special deputy Attorney General, Morio Omori and Deputy Attorney General, Philip Chun in their memorandum dated August 26, 1959; MO:PTC:mym, 356:C-7494, 25, in the following manner:

> . . . Article XI, on the one hand, provides that the Hawaiian Homes Commission Act is adopted as a law of the State and subject to amendment or repeal by the State legislature, with the proviso that, to the extent the United States would require, the Act shall be subject to amendment or repeal only with the consent of the United States. On the other hand, section 4 of Public Law 86-3 provides that the Act be adopted as a provision of the State Constitution, not as a law of the State, as provided in section 7(b) of Public Law 86-3.
>
> To add to the confusion, section 7(b), instead of substituting the provisions of section 4 of Public Law 86-3 for section 1 of Article XI, provides that "Article XI shall be deemed to include the provisions of section 4 of this Act." In effect, therefore, and as a result of the plebiscite and section 7(b), the provision in section 1, Article XI, that the Hawaiian Homes Commission Act shall be a law of the State and the provision in section 4, Public Law 86-3, that said act is adopted as a part of the State Constitution are both made a part of Article XI. Moveover, Congress deems both provisions to be consistent. (See H.R. Rep. No. 32, 86th Cong. 1st Sess., p. 19; S. Rep. No. 80, 86th Cong. 1st Sess., pp. 16-17. See Memo dated July 17, 1959 and Supplement to Memo, dated July 27, 1959, from Rhoda V. Lewis, supra, for legislative history and comments.)

From this conflict, the following questions arise:

(1) Is the entire Hawaiian Homes Commission Act adopted as a provision of the State Constitution?

(2) How may the State amend the Hawaiian Homes Commission Act?

THE HAWAIIAN HOMES COMMISSION ACT AS PART OF THE STATE CONSTITUTION

The Attorney General, in Opinion No. 61-21 of February 21, 1961, stated that the Act in its entirety was not adopted as part of the State Constitution upon amendment of Article XI:

> To hold that the Hawaiian Homes Commission Act, in its entirety, is adopted as a provision of our State Constitution would, aside from other serious objections, create a difficult, cumbersome, and time-consuming process for effectuating amendments thereto. It is extremely doubtful that the Congress ever intended that the Hawaiian Homes Commission Act, in its entirety, were to be adopted as a provision of our State Constitution. It seems that the literal language appearing in section 4 of the Admission Act has beclouded the true intent of the Congress. What Congress contemplated appears to be this: that Article XI of our State Constitution shall be deemed amended to include the basic provisions of section 4 of the Admission Act, to wit, the provisions providing that as a compact with the United States, the Constitution of the State of Hawaii shall include a provision under Article XI thereof providing for the continuance of the Hawaiian Homes Commission Act for the rehabilitation of the Hawaiian race as a state law, subject to amendment, whether by constitutional amendment or by state legislative act or repeal, only with the consent of the United States unless otherwise expressly provided therein by Congress. This interpretation is consistent with the intent expressed by Congress in Senate Report No. 80, dated March 5, 1959, which recommended passage of the Admission Act. This Report states, in part, as follows:
>
> > 'Section 4 requires the State of Hawaii to adopt the Hawaiian Homes Commission Act, 1920, as a provision of its constitution and provides that it shall not be changed in its basic provisions except with the consent of the United States. Article XI of the constitution of Hawaii conforms to this requirement. The Hawaiian Homes Commission Act is a law which set aside certain lands in order to provide for the welfare of native Hawaiians. While the new State will be able to make changes in the administration of the act without the consent of Congress, it will not be authorized, without such consent, to impair by legislation or constitutional amendment the funds set up under it or to disturb in other ways its substantive provisions to the detriment of the intended beneficiaries.' (See 2 U. S. Code, Congressional and Administrative News, First Session, 1959, pp. 1346-1361 at 1361. Underlining for emphasis.)

AMENDMENT PROCEDURE

There seems little doubt that amendments to those sections enumerated in section 4 of the Admission Act relating to administration and to powers and duties of officers other than those charged

with the administration of the Act and amendments designed to increase the benefits of lessees may be effected, without the consent of the United States, by constitutional amendment or by state legislation. Section 4 also makes it clear that the basic and substantive provisions of the Act such as those relating to the various funds, encumbrances that may be placed on Hawaiian home lands, qualifications of lessees and the use of the income and proceeds from available lands, may not be amended without the consent of the United States.

Thus, the major unanswered question has been stated as:

> What procedure must be followed to amend or repeal those sections which require the consent of the United States; i.e. can said sections be amended or repealed by State legislative enactment (in the manner required for State legislation) with the consent of the United States or must they be amended or repealed in the manner required for constitutional amendment or repeal (Article XV of the State Constitution), with the consent of the United States, or are both procedures of amendment or repeal with the consent of the United States available under Public Law 86-3, sections 4 and 7 and Article XI of the State Constitution? (Memorandum dated August 26, 1959; MO:PTC:mym; 356:C-7494, 25, at p. 5)

The question as posed above has as yet not been officially answered by the Attorney General in a formal ruling. The memorandum of Vernon Char dated April 4, 1960; VFLC:ru; 343:IX-A stated that the Attorney General was unable to reach a conclusion regarding the procedure to be followed in amending the basic and substantive provisions of the Hawaiian Homes Commission Act due to the apparent conflicting provisions of the Constitution. However, he suggested that the Legislature, if it desired some authoritative ruling on the part of the United States, should amend the Act by bill and submit such bill to the United States Congress for approval.

It is interesting to note, however, that the memorandum of Morio Omori and Philip Chun, supra, which was not adopted by the Attorney General, reached a conclusion when it stated on page 9:

> . . . It is submitted, in view of the legislative history of the various statehood bills and the legislative intent expressed in the House and Senate reports, that the basic, substantive and unexcepted sections of the Hawaiian Homes Commission Act, though adopted as a provision of the State Constitution, may be amended or repealed either by constitutional procedures or by State legislative procedures, with the consent of the United States.

AMENDMENTS TO THE ACT

Since the admission of Hawaii as a State, the Hawaiian Homes Commission Act has been amended by the state legislature:

(1) L. Sp. 1959, 2d, c. 1 (Reorganization Act), impliedly amended section 202 of the Hawaiian Homes Commission Act when it: (a) abolished the Hawaiian Homes Commission and transferred the functions and duties of the Commission to the Department of Hawaiian Home Lands to be headed by a new commission called the Hawaiian Homes Commission; and (b) amended the method of appointment, removal, and tenure of the new commission.

(2) L. 1962, c. 14 and 18 amended section 214 (purposes of loans), section 215 (conditions of loans), section 216 (insurance by borrowers, acceleration of loans, lien and enforcement thereof), and added a new section 219.1 (general assistance).

(3) L. 1963, c. 207 amended section 202 (department officers, staff, commission members, compensation), section 215 (conditions of loans), section 222 (administration) and various other sections by substituting the words "department" for "commission", "state" for "territory" and "board of land and natural resources" for "commissioner of public lands".

These amendments were accomplished by simple state legislation. It should be noted that some of the sections which were amended are not listed as excepted sections in section 4 of the Admission Act. However, such amendments were enacted by the state Legislature as being provisions which increased the benefits of lessees.

CONCLUDING NOTE

From the foregoing discussion, in amending the Hawaiian Homes Commission Act, it seems clear that sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration and sections 204(2), 206, and 212 and other provisions relating to the powers and duties of officers other than those charged with the administration of the Act and amendments to increase the benefits of lessees may be amended by simple state legislation or by constitutional amendment. However, in the case of amendments to increase the benefits of lessees, it seems that the legislature has followed the procedure of submitting the proposed amendment to the Attorney

General for review and opinion as to whether or not such amendment does in fact increase the benefit of lessees.

The method of amending the basic or substantive provisions of the Hawaiian Homes Commission Act has as yet not been officially ruled upon by the Attorney General. However, it has been suggested that the legislature enact a bill amending substantive provisions of the Act and then submit the same for approval by the United States.

FOOTNOTES

1. Allan A. Spitz, Land Aspects of the Hawaiian Homes Program (University of Hawaii, Legislative Reference Bureau, Rept. No. 1b, 1964), pp. 5-15.

2. The Department reports that they do in fact insure all improvements for which a loan is outstanding until the loan is fully repaid.

3. For a discussion of this limit see Allan A. Spitz, Organization and Administration of the Hawaiian Homes Program (University of Hawaii, Legislative Reference Bureau, 1963), pp. 22-25.

4. U. S., Congress, Senate, Committee on Territories, Hearings on H.R. 13500, To Amend Act to Provide a Government for the Territory of Hawaii, To Establish an Hawaiian Homes Commission, and for Other Purposes, 66th Cong., 2d Sess., 1921, pp. 134-136. See also U. S., Congress, House, Committee on Territories, Hearings on Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii and on the Proposed Transfer of the Buildings on the Federal Leprosy Investigation Station at Kalawao on the Island of Molokai, 66th Cong., 2d Sess., 1920, pp. 162-164.

5. U. S., Congress, House, Committee on Territories, Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii . . . , pp. 130-131.

6. U. S., Congress, House, Committee on Territories, Rehabilitation of Native Hawaiians, 66th Cong., 2d Sess., 1920, Rept. No. 839 to accompany H. R. 13500, p.

7. Hawaii, Constitutional Convention, 1950, Proceedings, Vol. I, Standing Committee Report No. 33, pp. 170-171.

8. Constitutional Convention, Proceedings, Vol. II, pp. 34-38.

9. Ibid., p. 668.

10. Ibid., p. 669.

11. Ibid., p. 670.

12. Ibid., p. 672.

13. 81 C. J. S., States, sec. 22, p. 921.

APPENDIX

INDEX OF OPINIONS AND CASES

Mrs. Martha Herrick prepared the manuscript for printing.